

THE GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED RULES

May 2006 Supplement to the 2006 Edition

Prepared Under the Supervision of
THE DEPARTMENT OF JUSTICE
OF THE STATE OF NORTH CAROLINA
by
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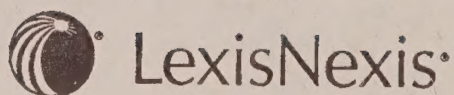
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Preface

This May 2006 Supplement to the 2006 Edition of the Annotated Rules of North Carolina contains amendments to the rules of the courts of North Carolina and those federal rules set out in the 2006 Edition affected by orders promulgated since the publication of the 2006 Edition through April 15, 2006. It also contains annotations taken from decisions of the North Carolina Supreme Court, decisions of the North Carolina Court of Appeals, and decisions of appropriate federal courts posted on LEXIS through March 10, 2006.

This publication has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any defects they may find herein and any suggestions they may have for improving the Annotated Rules of North Carolina to the Department, or to LexisNexis, Charlottesville, Virginia.

ROY COOPER
Attorney General

May 2006

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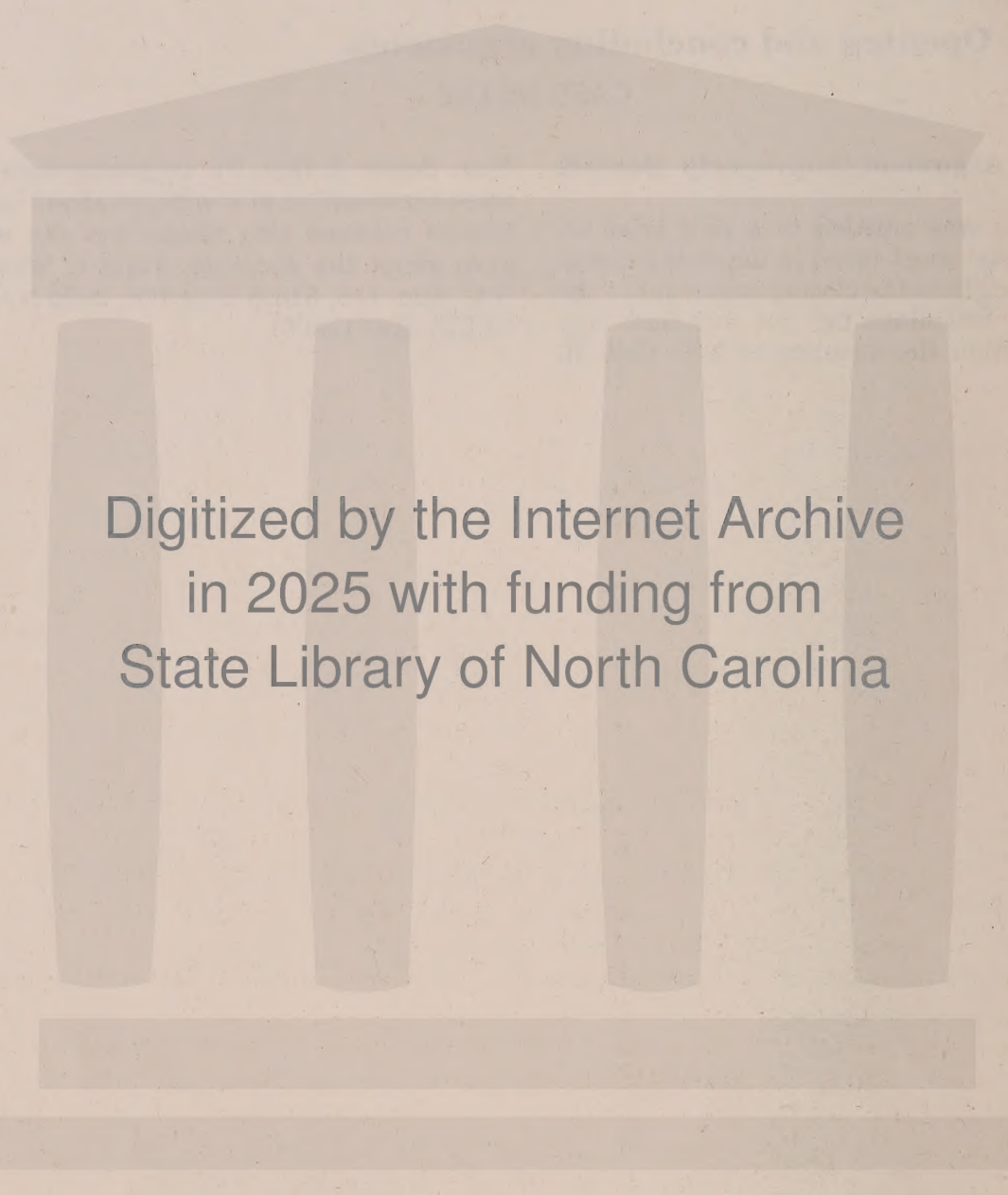
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RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFER- ENCES IN SUPERIOR COURT CIVIL ACTIONS

Adopted October 2, 1991,
with revisions effective March 1, 2006.

Rule	Rule
1. Initiating settlement events.	8. Mediator certification and decertification.
2. Selection of mediator.	10. Other settlement procedures.
4. Duties of parties, attorneys and other participants in mediated settlement conferences.	Index follows Rules.

Rule 1. Initiating settlement events.

A. *Purpose of mandatory settlement procedures.* Pursuant to G.S. 7A-38.1, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the Court pursuant to these Rules.

B. *Duty of counsel to consult with clients and opposing counsel concerning settlement procedures.* In furtherance of this purpose, counsel, upon being retained to represent any party to a superior court case, shall advise his or her client(s) regarding the settlement procedures approved by these Rules and shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

C. *Initiating the mediated settlement conference in each action by court order.*

(1) *Order by Senior Resident Superior Court Judge.* The Senior Resident Superior Court Judge of any judicial district shall, by written order, require all persons and entities in Rule 4 to attend a pre-trial mediated settlement conference in all civil actions except those actions in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license. The judge may withdraw his/her order upon motion of a party pursuant to Rule 1.C.6 only for good cause shown.

(2) *Motion to authorize the use of other settlement procedures.* The parties may move the Senior Resident Superior Court Judge to authorize the use of some other settlement procedure allowed by these rules or by local rule in lieu of a mediated settlement conference, as provided in G.S. 7A-38.1(i). Such motion shall be filed within 21 days of the order requiring a mediated settlement conference on an AOC form, and shall include:

- (a) the type of other settlement procedure requested;
- (b) the name, address and telephone number of the neutral selected by the parties;
- (c) the rate of compensation of the neutral;
- (d) that the neutral and opposing counsel have agreed upon the selection and compensation of the neutral selected;
- (e) that all parties consent to the motion.

If the parties are unable to agree to each of the above, then the Senior Resident Superior Court Judge shall deny the motion and the parties shall

attend the mediated settlement conference as originally ordered by the Court. Otherwise, the court may order the use of any agreed upon settlement procedures authorized by Rules 10-12 herein or by local rules of the Superior Court in the county or district where the action is pending.

(3) *Timing of the order.* The Senior Resident Superior Court Judge shall issue the order requiring a mediated settlement conference as soon as practicable after the time for the filing of answers has expired. Rules 1.A.(4) and 3.B. herein shall govern the content of the order and the date of completion of the conference.

(4) *Content of order.* The court's order shall (1) require the mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator as provided by Rule 2; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator pursuant to Rule 2; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court. The order shall be on an A.O.C. form.

(5) *Motion for court ordered mediated settlement conference.* In cases not ordered to mediated settlement conference, any party may file a written motion with the Senior Resident Superior Court Judge requesting that such conference be ordered. Such motion shall state the reasons why the order should be allowed and shall be served on non-moving parties. Objections to the motion may be filed in writing with the Senior Resident Superior Court Judge within 10 days after the date of the service of the motion. Thereafter, the Judge shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

(6) *Motion to dispense with mediated settlement conference.* A party may move the Senior Resident Superior Court Judge, to dispense with the mediated settlement conference ordered by the Judge. Such motion shall state the reasons the relief is sought. For good cause shown, the Senior Resident Superior Court Judge may grant the motion.

D. Initiating the mediated settlement conference by local rule.

(1) *Order by local rule.* In judicial districts in which a system of scheduling orders or scheduling conferences is utilized to aid in the administration of civil cases, the Senior Resident Superior Court Judge of said districts shall, by local rule, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in all civil actions except those actions in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license. The judge may withdraw his/her order upon motion of a party pursuant to Rule 1.D.6. only for good cause shown.

(2) *Scheduling orders or notices.* In judicial districts in which scheduling orders or notices are utilized to manage civil cases and for all cases ordered to mediated settlement conference by local rule, said order or notice shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator and the deadline by which that selection should be made; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

(3) *Scheduling Conferences.* In judicial districts in which scheduling conferences are utilized to manage civil cases and for cases ordered to mediated settlement conferences by local rule, the notice for said scheduling conference

shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator and the deadline by which that selection should be made; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

(4) *Application of Rule 1.B.* The provisions of Rule 1.B.(2), (5) and (6) shall apply to Rule 1.C. except for the time limitations set out therein.

(5) *Deadline for completion.* The provisions of Rule 3.B. determining the deadline for completion of the mediated settlement conference shall not apply to mediated settlement conferences conducted pursuant to Rule 1.C. The deadline for completion shall be set by the Senior Resident Superior Court Judge or designee at the scheduling conference or in the scheduling order or notice, whichever is applicable. However, the completion deadline shall be well in advance of the trial date.

(6) *Selection of mediator.* The parties may select or nominate, or the Senior Resident Superior Court Judge may appoint, mediators pursuant to the provisions of Rule 2., except that the time limits for selection, nomination, and appointment shall be set by local rule. All other provisions of Rule 2. shall apply to mediated settlement conferences conducted pursuant to Rule 1.C.

(7) *Use of other settlement procedures.* The parties may utilize other settlement procedures pursuant to the provisions of Rule 1.C.(2) and Rule 10. However, the time limits and method of moving the court for approval to utilize another settlement procedure set out in those rules shall not apply and shall be governed by local rule.

Rule 2. Selection of mediator.

A. *Selection of certified mediator by agreement of parties.* The parties may select a mediator certified pursuant to these Rules by agreement within 21 days of the court's order. The plaintiff's attorney shall file with the court a Notice of Selection of Mediator by Agreement within 21 days of the court's order, however, any party may file the notice. Such notice shall state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules. The notice shall be on an AOC form.

B. *Approval of party nominee eliminated.* As of January 1, 2006, the former Rule 2.B. rule allowing the approval of a non-certified mediator is rescinded. Beginning on that date, the Senior Resident Superior Court Judge shall appoint mediators certified by the Dispute Resolution Commission, pursuant to Rule 2.C. which follows.

C. *Appointment of mediator by the court.* If the parties cannot agree upon the selection of a mediator, the plaintiff or plaintiff's attorney shall so notify the court and request, on behalf of the parties, that the Senior Resident Superior Court Judge appoint a mediator. The motion must be filed within 21 days after the court's order and shall state that the attorneys for the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree upon a mediator. The motion shall be on a form approved by the Administrative Office of the Courts.

Upon receipt of a motion to appoint a mediator, or failure of the parties to file a Notice of Selection with the court within 21 days of the court's order, the Senior Resident Superior Court Judge shall appoint a mediator, certified

pursuant to these Rules, who has expressed a willingness to mediate actions within the Judge's district.

In making such appointments, the Senior Resident Superior Court Judge shall rotate through the list of available certified mediators. Appointments shall be made without regard to race, gender, religious affiliation, or whether the mediator is a licensed attorney. Certified mediators who do not reside in the judicial district, or a county contiguous to the judicial district, shall be included in the list of mediators available for appointment only if, on an annual basis, they inform the Judge in writing that they agree to mediate cases to which they are assigned. The Senior Resident Superior Court Judge shall retain discretion to depart in a specific case from a strict rotation when, in the judge's discretion, there is good cause to do so.

The Dispute Resolution Commission shall furnish to the Senior Resident Superior Court Judge of each judicial district a list of those certified superior court mediators requesting appointments in that district. Said list shall contain the mediators' names, addresses and telephone numbers and shall be provided both in writing and electronically through the Commission's website. The Commission shall promptly notify the Senior Resident Superior Judge of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

D. *Mediator information directory.* To assist the parties in the selection of a mediator by agreement, the Senior Resident Superior Court Judge having authority over any county participating in the mediated settlement conference program shall prepare and keep current for such county a central directory of information on all certified mediators who wish to mediate cases in that county. Such information shall be collected on loose leaf forms provided by the Dispute Resolution Commission and be kept in one or more notebooks made available for inspection by attorneys and parties in the office of the Clerk of Superior Court in such county.

E. *Disqualification of mediator.* Any party may move the Senior Resident Superior Court Judge of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

Rule 4. Duties of parties, attorneys and other participants in mediated settlement conferences.

A. Attendance.

(1) The following persons shall attend a mediated settlement conference:

(a) Parties.

(i) All individual parties.

(ii) Any party that is not a natural person or a governmental entity shall be represented at the conference by an officer, employee or agent who is not such party's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the action;

(iii) Any party that is a governmental entity shall be represented at the conference by an employee or agent who is not such party's outside counsel and who has authority to decide on behalf of such party whether and on what terms to settle the action; provided, if under law proposed settlement terms can be approved only by a board, the representative shall have authority to negotiate on behalf of the party and to make a recommendation to that board.

(b) *Insurance company representatives.* A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier which may be obligated to pay all or part of any

claim presented in the action. Each such carrier shall be represented at the conference by an officer, employee or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of such carrier or who has been authorized to negotiate on behalf of the carrier and can promptly communicate during the conference with persons who have such decision-making authority.

(c) *Attorneys.* At least one counsel of record for each party or other participant, whose counsel has appeared in the action.

(2) Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.C. or an impasse has been declared. Any such party or person may have the attendance requirement excused or modified, including the allowance of that party's or person's participation without physical attendance:

(a) By agreement of all parties and persons required to attend and the mediator; or

(b) By order of the Senior Resident Superior Court Judge, upon motion of a party and notice to all parties and persons required to attend and the mediator.

(3) *Scheduling.* Participants required to attend shall promptly notify the mediator after selection or appointment of any significant problems they may have with dates for conference sessions before the completion deadline, and shall keep the mediator informed as to such problems as may arise before an anticipated conference session is scheduled by the mediator. After a conference session has been scheduled by the mediator, and a scheduling conflict with another court proceeding thereafter arises, participants shall promptly attempt to resolve it pursuant to Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina June 20, 1985.

B. *Notifying lien holders.* Any party or attorney who has received notice of a lien or other claim upon proceeds recovered in the action shall notify said lien holder or claimant of the date, time, and location of the mediated settlement conference and shall request said lien holder or claimant to attend the conference or make a representative available with whom to communicate during the conference.

C. *Finalizing agreement.*

(1) If an agreement is reached at the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically recorded. If an agreement is upon all issues, a consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.

(2) If the agreement is upon all issues at the conference, the person(s) responsible for filing closing documents with the court shall also sign the mediator's report to the court. The parties shall give a copy of their signed agreement, consent judgment, or voluntary dismissal(s) to the mediator and all parties at the conference and shall file a consent judgment or voluntary dismissal(s) with the court within thirty (30) days or within ninety days (90) days if the State or a political subdivision thereof is a party to the action, or before expiration of the mediation deadline, whichever is longer. In all cases, consent judgments or voluntary dismissals shall be filed prior to the scheduled trial.

(3) If an agreement is reached upon all issues prior to the conference or finalized while the conference is in recess, the parties shall reduce its terms to writing and sign it along with their counsel and shall file a consent judgment or voluntary dismissal(s) disposing of all issues with the court thirty (30) days

or within ninety (90) days if the State or a political subdivision thereof is a party to the action, or before the expiration of the mediation deadline, whichever is longer.

(4) When a case is settled upon all issues, all attorneys of record must notify the Senior Resident Judge within four business days of the settlement and advise who will file the consent judgment or voluntary dismissal(s), *and when*.

D. *Payment of mediator's fee.* The parties shall pay the mediator's fee as provided by Rule 7.

E. *Related Cases.* Upon application by any party or person, the Senior Resident Superior Court Judge may order that an attorney of record or a party in a pending Superior Court Case or a representative of an insurance carrier that may be liable for all or any part of a claim pending in Superior Court shall, upon reasonable notice, attend a mediation conference that may be convened in another pending case, regardless of the forum in which the other case may be pending, provided that all parties in the other pending case consent to the attendance ordered pursuant to this rule. Any such attorney, party or carrier representative that properly attends a mediation conference pursuant to this rule shall not be required to pay any of the mediation fees or costs related to that mediation conference. Any disputed issues concerning an order entered pursuant to this rule shall be determined by the Senior Resident Superior Court Judge who entered the order.

Rule 7. Compensation of the mediator.

DRC COMMENTS TO RULE 7

DRC Comment to Rule 7.B.

Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a court-ordered mediation.

It is not unusual for two or more related cases to be mediated collectively. A mediator shall use his or her business judgment in assessing the

one time, per case administrative fee when two or more cases are mediated together and set his/her fee according to the amount of time s/he spent in an effort to schedule the matter for mediation. The mediator may charge a flat fee of \$125.00 if scheduling was relatively easy or multiples of that amount if more effort was required.

Rule 8. Mediator certification and decertification.

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as Superior Court mediators. For certification, a person shall:

A. Have completed a minimum of 40 hours in a trial court mediation training program certified by the Dispute Resolution Commission, or have completed a 16 hour supplemental trial court mediation training certified by the Commission after having been certified by the Commission as a family financial mediator;

B. Have the following training, experience and qualifications:

(1) An attorney may be certified if he or she:

(a) is either:

(i) a member in good standing of the North Carolina State Bar, pursuant to Title 27, N.C. Administrative Code, The N.C. State Bar, Chapter 1, Subchapter A, Section .0201(b) or Section .0201(c)(1), as those rules existed January 1, 2000, or

(ii) a member similarly in good standing of the Bar of another state and a graduate of a law school recognized as accredited by the North Carolina Board of Law Examiners; demonstrates familiarity with North Carolina court structure, legal terminology and civil procedure; and provides to the Dispute Resolution Commission three letters of reference as to the applicant's good

character, including at least one letter from a person with knowledge of the applicant's practice as an attorney; and

(b) has at least five years of experience as a judge, practicing attorney, law professor and/or mediator, or equivalent experience.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule 8B.(1) or Rule 8B.(2).

(2) A non-attorney may be certified if he or she has completed the following:

(a) a six hour training on North Carolina court organization, legal terminology, civil court procedure, the attorney-client privilege, the unauthorized practice of law, and common legal issues arising in Superior Court cases, provided by a trainer certified by the Dispute Resolution Commission;

(b) provide to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's experience claimed in Rule 8.B.(2)(c);

(c) one of the following; (i) a minimum of 20 hours of basic mediation training provided by a trainer acceptable to the Dispute Resolution Commission; and after completing the 20 hour training, mediating at least 30 disputes, over the course of at least three years, or equivalent experience, and possess a four year college degree from an accredited institution, except that the four-year degree requirement shall not be applicable to mediators certified prior to January 1, 2005 and have four years of professional, management or administrative experience in a professional, business, or governmental entity; or (ii) ten years of professional, management or administrative experience in a professional, business, or governmental entity and possess a four-year college degree from an accredited institution, except that the four-year degree requirement shall not be applicable to mediators certified prior to January 1, 2005.

(d) Observe three mediated settlement conferences meeting the requirements of Rule 8.C. conducted by at least two different certified mediators, in addition to those required by Rule 8.C.

(3) Any person who has not been certified as a mediator pursuant to these rules may be certified without compliance with Rule 8.A., Rule 8.C., and the other provisions of Rule 8.B. if:

(a) the applicant for certification applies for certification before September 1, 2006, and

(b) the applicant has, by selection of the parties, mediated at least ten cases in the North Carolina Superior Court, North Carolina Industrial Commission, North Carolina Office of Administrative Hearings, North Carolina Court of Appeals, or United States District Courts for North Carolina before September 1, 2005, as shown by proof satisfactory to the Dispute Resolution Commission.

C. Observe two mediated settlement conferences conducted by a certified Superior Court mediator;

(1) at least one of which must be court ordered by a Superior Court,

(2) the other may be a mediated settlement conference conducted under rules and procedures substantially similar to those set out herein in cases pending in the North Carolina Court of Appeals, North Carolina Industrial Commission, the North Carolina Office of Administrative Hearings, the North Carolina Superior Court or the United States District Courts for North Carolina.

D. Demonstrate familiarity with the statute, rules, and practice governing mediated settlement conferences in North Carolina;

E. Be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court. Applicants for certification and re-certification and all certified Superior Court mediators shall report to the Commission any criminal convictions, disbarments or other disciplinary complaints and actions as soon as the applicant or mediator has notice of them;

F. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission;

G. Pay all administrative fees established by the Administrative Office of the Courts upon the recommendation of the Dispute Resolution Commission;

H. Agree to accept as payment in full of a party's share of the mediator's fee, the fee ordered by the Court pursuant to Rule 7; and

I. Comply with the requirements of the Dispute Resolution Commission for continuing mediator education or training. (These requirements may include completion of training or self-study designed to improve a mediator's communication, negotiation, facilitation or mediation skills; completion of observations; service as a mentor to a less experienced mediator; being mentored by a more experienced mediator; or serving as a trainer. Mediators shall report on a Commission approved form.)

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

Rule 10. Other settlement procedures.

A. *Order authorizing other settlement procedures.* Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the Senior Resident Superior Court Judge may order the use of the procedure requested under these rules or under local rules unless the court finds that the parties did not agree upon all of the relevant details of the procedure, (including items a-e in Rule 1.C.(2)); or that for good cause, the selected procedure is not appropriate for the case or the parties.

B. *Other settlement procedures authorized by these rules.* In addition to mediated settlement conferences, the following settlement procedures are authorized by these Rules;

(1) *Neutral Evaluation (Rule 11).* Neutral evaluation in which a neutral offers an advisory evaluation of the case following summary presentations by each party.

(2) *Arbitration (Rule 12).* Non-Binding Arbitration, in which a neutral renders an advisory decision following summary presentations of the case by the parties and Binding Arbitration, in which a neutral renders a binding decision following presentations by the parties.

(3) *Summary trials (Jury or Non-Jury) (Rule 13).* Non-binding summary trials, in which a privately procured jury or presiding officer renders an advisory verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer; and binding summary trials, in which a privately procured jury or presiding officer renders a binding verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer.

C. *General rules applicable to other settlement procedures.*

(1) *When proceeding is conducted.* Other settlement procedures ordered by the court pursuant to these rules shall be conducted no later than the date of completion set out in the court's original mediated settlement conference order unless extended by the Senior Resident Superior Court Judge.

(2) *Authority and duties of neutrals.*

(a) *Authority of neutrals.*

(i) *Control of proceeding.* The neutral evaluator, arbitrator, or presiding officer shall at all times be in control of the proceeding and the procedures to be followed.

(ii) *Scheduling the proceeding.* The neutral evaluator, arbitrator, or presiding officer shall attempt to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral(s). In the absence of agreement, such neutral shall select the date for the proceeding.

(b) *Duties of neutrals.*

(i) The neutral evaluator, arbitrator, or presiding officer shall define and describe the following at the beginning of the proceeding.

(a) The process of the proceeding;

(b) The differences between the proceeding and other forms of conflict resolution;

(c) The costs of the proceeding;

(d) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1(i) and Rule 10.C.(6) herein; and

(e) The duties and responsibilities of the neutral(s) and the participants.

(ii) *Disclosure.* Each neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice, or partiality.

(iii) *Reporting results of the proceeding.* The neutral evaluator, arbitrator, or presiding officer shall report the result of the proceeding to the court on an AOC form. The Administrative Office of the Courts may require the neutral to provide statistical data for evaluation of other settlement procedures on forms provided by it.

(iv) *Scheduling and holding the proceeding.* It is the duty of the neutral evaluator, arbitrator, or presiding officer to schedule the proceeding and conduct it prior to the completion deadline set out in the court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral evaluator, arbitrator, or presiding officer unless said time limit is changed by a written order of the Senior Resident Superior Court Judge.

(3) *Extensions of time.* A party or a neutral may request the Senior Resident Superior Court Judge to extend the deadlines for completion of the settlement procedure. A request for and extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. If the court grants the motion for an extension, this order shall set a new deadline for the completion of the settlement procedure. Said order shall be delivered to all parties and the neutral by the person who sought the extension.

(4) *Where procedure is conducted.* The neutral evaluator, arbitrator, or presiding officer shall be responsible for reserving a place agreed to by the parties, setting a time, and making other arrangements for the proceeding, and for giving timely notice to all attorneys and unrepresented parties in writing of the time and location of the proceeding.

(5) *No delay of other proceedings.* Settlement proceedings shall not be cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Senior Resident Superior Court Judge.

(6) *Inadmissibility of settlement proceedings.* Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceedings, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except;

(a) In proceedings for sanctions under this section;

(b) In proceedings to enforce or rescind a settlement of the action;

(c) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or

(d) In proceedings to enforce laws concerning juvenile or elder abuse.

As used in this section, the term “neutral observer” includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at the proceeding conducted under this subsection or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a mediated settlement conference or other settlement proceeding.

No mediator, other neutral, or neutral observer present at a settlement proceedings shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to a mediated settlement conference or other settlement proceeding pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.

(7) *No record made.* There shall be no record made of any proceedings under these Rules unless the parties have stipulated to binding arbitration or binding summary trial in which case any party after giving adequate notice to opposing parties may record the proceeding.

(8) *Ex parte communication prohibited.* Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.

(9) *Duties of the parties.*

(a) *Attendance.* All persons required to attend a mediated settlement conference pursuant to Rule 4 shall attend any other settlement procedure which is non-binding in nature, authorized by these rules, and ordered by the court except those persons to whom the parties agree and the Senior Resident Superior Court judge excuses. Those persons required to attend other settlement procedures which are binding in nature, authorized by these rules, and ordered by the court shall be those persons to whom the parties agree.

Notice of such agreement shall be given to the court and to the neutral through the filing of a motion to authorize the use of other settlement procedures within 21 days after entry of the Order requiring a mediated settlement conference. The notice shall be on an AOC form.

(b) *Finalizing agreement.*

(i) If an agreement is reached on all issues at the neutral evaluation, arbitration, or summary trial, the parties to the agreement shall reduce its terms to writing and sign it along with their counsel. A consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate within fourteen (14) days of the conclusion of the proceeding or before the expiration of the deadline for its completion, whichever is longer. The person(s) responsible for filing closing documents with the court shall also sign the report to the court. The parties shall give a copy of their signed agreement, consent judgment, or voluntary dismissal(s) to the neutral evaluator, arbitrator, or presiding officer and all parties at the proceeding.

(ii) If an agreement is reached upon all issues prior to the evaluation, arbitration, or summary trial or while the proceeding is in recess, the parties shall reduce its terms to writing and sign it along with their counsel and shall file a consent judgment or voluntary dismissal(s) disposing of all issues with the court within fourteen (14) days or before the expiration of the deadline for completion of the proceeding whichever is longer.

(iii) When a case is settled upon all issues, all attorneys of record must notify the Senior Resident Judge within four business days of the settlement and advise who will sign the consent judgment or voluntary dismissal(s), *and when*.

(c) *Payment of neutral's fee.* The parties shall pay the neutral's fee as provided by Rule 10.C.(12).

(10) *Selection of neutrals in other settlement procedures.* The parties may select any individual to serve as a neutral in any settlement procedure authorized by these rules. For arbitration, the parties may select either a single arbitrator or a panel of arbitrators. Notice of such selection shall be given to the court and to the neutral through the filing of a motion to authorize the use of other settlement procedures within 21 days after entry of the Order requiring a mediated settlement conference.

The notice shall be on an AOC form. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

(11) *Disqualification.* Any party may move a Resident or Presiding Superior Court Judge of the district in which an action is pending for an order disqualifying the neutral; and for good cause, such order shall be entered. Cause shall exist if the selected neutral has violated any standard of conduct of the State Bar or any standard of conduct for neutrals that may be adopted by the Supreme Court.

(12) *Compensation of the neutral.* A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparing for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time.

Unless otherwise ordered by the court or agreed to by the parties, the neutral's fees shall be paid in equal shares by the parties. For purposes of this section, multiple parties shall be considered one party when they are represented by the same counsel. The presiding officer and jurors in a summary jury trial are neutrals within the meaning of these Rules and shall be compensated by the parties.

(13) *Sanctions for failure to attend other settlement procedures.* If any person required to attend a settlement procedure fails to attend without good cause, a Resident or Presiding Judge may impose upon the person any appropriate monetary sanction including but not limited to, the payment of fines, reimbursement of a party's attorney fees, expenses, and share of the neutral's fee and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against a person, or a Resident or Presiding Judge upon his/her own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

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RULES IMPLEMENTING MEDIATION IN MATTERS BEFORE THE CLERK OF SUPERIOR COURT

Adopted January 26, 2006.

Rule

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Rule 1. Initiating mediation in matters before the clerk.

A. *Purpose of mandatory mediation.* These Rules are promulgated pursuant to G.S. 7A-38,3B to implement mediation in certain cases within the Clerk's jurisdiction. The procedures set out here are designed to focus the parties' attention on settlement and resolution rather than on preparation for contested hearings and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in other settlement efforts voluntarily either prior to or after the filing of a matter with the Clerk.

B. *Duty of counsel to consult with clients and opposing counsel concerning settlement procedures.* In furtherance of this purpose, counsel, upon being retained to represent a party to a matter before the Clerk, shall discuss the means available to the parties through mediation and other settlement procedures to resolve their disputes without resort to a contested hearing. Counsel shall so discuss with each other what settlement procedure and which neutral third party would best suit their clients and the matter in controversy.

C. *Initiating the mediation by order of the court.*

(1) *Order by The Clerk of Superior Court.* The Clerk of Superior Court of any county may, by written order, require all persons and entities identified in Rule 4 to attend a mediation in any matter in which the Clerk has original or exclusive jurisdiction, except those matters under NCGS Chapters 45 and 48 and those matters in which the jurisdiction of the Clerk is ancillary.

(2) *Content of Order.* The order shall be on an AOC form and shall:

- (a) require that a mediation be held in the case;
- (b) establish deadlines for the selection of a mediator and completion of the mediation;
- (c) state the names of the persons and entities who shall attend the mediation;
- (d) state clearly that the persons ordered to attend have the right to select their own mediator as provided by Rule 2;
- (e) state the rate of compensation of the court appointed mediator in the event that those persons do not exercise their right to select a mediator pursuant to Rule 2; and
- (f) state that those persons shall be required to pay the mediator's fee in shares determined by the Clerk.

(3) *Motion for Court Ordered Mediation.* In matters not ordered to mediation, any party, interested persons, or fiduciary may file a written motion with

the Clerk requesting that mediation be ordered. Such motion shall state the reasons why the order should be allowed and shall be served in accordance with Rule 5 of the N.C.R.C.P. on non-moving parties, interested persons, and fiduciaries designated by the Clerk or identified by the petitioner in the pleadings. Objections to the motion may be filed in writing within 5 days after the date of the service of the motion. Thereafter, the Clerk shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

(4) *Informational Brochure.* The Clerk shall serve a brochure prepared by the Dispute Resolution Commission explaining the mediation process and the operations of the Commission along with the order required by Rule 1.C.(1) and 1.C.(3).

(5) *Motion to Dispense With Mediation.* A named party, interested person, or fiduciary may move the Clerk of Superior Court to dispense with a mediation ordered by the Clerk. Such motion shall state the reasons the relief is sought and shall be served on all persons ordered to attend and the mediator. For good cause shown, the Clerk may grant the motion.

(6) *Dismissal of Petition For the Adjudication of Incompetence.* The petitioner shall not voluntarily dismiss a petition for adjudication of incompetence after mediation is ordered.

Rule 2. Selection of mediator.

A. *Selection of certified mediator by agreement of parties.* The parties may select a mediator certified by the Dispute Resolution Commission by agreement within a period of time as set out in the Clerk's order. However, the parties may only select mediators certified for estate and guardianship matters pursuant to these Rules for estate or guardianship matters.

The petitioner shall file with the Clerk a Notice of Selection of Mediator by Agreement within the period set out in the Clerk's order; however, any party may file the notice. Such notice shall state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and persons ordered to attend have agreed upon the selection and rate of compensation; and state under what Rules the mediator is certified. The notice shall be on an AOC form.

B. *Appointment of mediator by the clerk.* In the event a notice of selection is not filed with the Clerk within the time for filing stated in the Clerk's order, the Clerk shall appoint a mediator certified by the Dispute Resolution Commission. The Clerk shall appoint only those mediators certified pursuant to these Rules for estate and guardianship matters to those matters. The Clerk may appoint any certified mediator who has expressed a desire to be appointed to mediate all other matters within the jurisdiction of the Clerk.

Except for good cause, mediators shall be appointed by the Clerk by rotation from a list of those certified mediators who wish to be appointed for matters within the Clerk's jurisdiction, without regard to occupation, race, gender, religion, national origin, disability, or whether they are an attorney.

C. *Mediator information directory.* The Dispute Resolution Commission shall maintain for the consideration of the Clerks of Superior Court and those selecting mediators for matters within the Clerk's jurisdiction a directory of certified mediators who request appointments in those matters and a directory of those mediators who are certified pursuant to these Rules. Said directory shall be maintained on the Commission's web site.

D. *Disqualification of mediator.* Any person ordered to attend a mediation pursuant to these Rules may move the Clerk of Superior Court of the county in which the matter is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

Rule 3. The mediation.

A. *Where mediation is to be held.* The mediation may be held in any location to which all the persons ordered to attend and the mediator agree. In the absence of such an agreement, the mediation shall be held in the courthouse or other public or community building in the county where the matter is pending. The mediator shall be responsible for reserving a place and making arrangements for the mediation and for giving timely notice of the time and location of the mediation to all persons ordered to attend.

B. *When mediation is to be held.* The Clerk's order issued pursuant to Rule 1.C.(3) shall state a deadline for completion of the mediation. The mediator shall set a date and time for the mediation pursuant to Rule 6.B.(5) and shall conduct the mediation before that date unless the date is extended by the Clerk.

C. *Request to extend deadline for completion.* The mediator or any person ordered to attend the mediation may request the Clerk of Superior Court to extend the deadline for completion of the mediation. Such request shall state the reasons the extension is sought and shall be delivered to all persons ordered to attend and the mediator. The Clerk may grant the request without hearing by setting a new deadline for the completion of the mediation, which date may be set at any time prior to the hearing. Notice of the Clerk's decision shall be delivered to all persons ordered to attend and the mediator by the person who sought the extension and shall be filed with the court.

D. *Recesses.* The mediator may recess the mediation at any time and may set times for reconvening which are prior to the deadline for completion. If the time for reconvening is set before the mediation is recessed, no further notification is required for persons present at the mediation.

E. *The mediation is not to delay other proceedings.* The mediation shall not be cause for the delay of other proceedings in the matter, including the completion of discovery, the filing or hearing of motions, or the hearing of the matter, except by order of the Clerk of Superior Court.

Rule 4. Duties of parties, attorneys and other participants in mediations.**A. Attendance.**

(1) Persons ordered by the Clerk to attend a mediation conducted pursuant to these Rules shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.B. or an impasse has been declared. Any such person may have the attendance requirement excused or modified, including the allowance of that person's participation by telephone or teleconference:

- (a) By agreement of all persons ordered to attend and the mediator; or
- (b) By order of the Clerk of Superior Court, upon motion of a person ordered to attend and notice of the motion to all other persons ordered to attend and the mediator.

(2) Any person ordered to attend a mediation conducted pursuant to these Rules that is not a natural person or a governmental entity shall be represented at the mediation by an officer, employee or agent who is not such person's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the matter.

(3) Any person ordered to attend a mediation conducted pursuant to these Rules that is a governmental entity shall be represented at the mediation by an employee or agent who is not such entity's outside counsel and who has authority to decide on behalf of such entity whether and on what terms to settle the matter; provided, however, if under law proposed settlement terms can be approved only by a governing board, the employee or agent shall have authority to negotiate on behalf of the governing board.

(4) An attorney ordered to attend a mediation pursuant to these Rules has satisfied the attendance requirement when at least one counsel of record for any person ordered to attend has attended the mediation.

(5) Other persons may participate in the mediation at the discretion of the mediator.

(6) Persons ordered to attend shall promptly notify the mediator after selection or appointment of any significant problems they may have with dates for mediation sessions before the completion deadline and shall keep the mediator informed to such problems as may arise before an anticipated session is scheduled by the mediator.

B. Finalizing agreement.

(1) If an agreement is reached at the mediation, in matters that, as a matter of law, may be resolved by the parties by agreement, the parties to the agreement shall reduce its terms to writing and sign it along with their counsel. The parties shall designate a person who will file a consent judgment or one or more voluntary dismissals with the Clerk and that person shall sign the mediator's report. If agreement is reached in such matters prior to the mediation or during a recess, the parties shall inform the mediator and the Clerk that the matter has been settled and, within 10 calendar days of the agreement being reached, file a consent judgment or voluntary dismissal(s).

(2) In all other matters, including guardianship and estate matters, if an agreement is reached upon some or all of the issues at mediation, the persons ordered to attend shall reduce its terms to writing and sign it along with their counsel, if any. Such agreements are not binding upon the Clerk but they may be offered into evidence at the hearing of the matter and may be considered by the Clerk for a just and fair resolution of the matter. Evidence of statements made and conduct occurring in a mediation where an agreement is reached is admissible pursuant to NCGS 7A-38.3B(g)(3).

All written agreements reached in such matters shall include the following language in a prominent place in the document:

"This agreement is not binding on the Clerk but will be presented to the Clerk as an aid to reaching a just resolution of the matter."

C. Payment of mediator's fee. The persons ordered to attend the mediation shall pay the mediator's fee as provided by Rule 7.

Rule 5. Sanctions for failure to attend mediation.

If a person ordered to attend a mediation pursuant to these Rules fails to attend without good cause, the Clerk may impose upon the person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the mediation.

A person seeking sanctions against another person shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all persons ordered to attend. The Clerk may initiate sanction proceedings upon its own motion by the entry of a show cause order. If the Clerk imposes sanctions, the Clerk shall do so, after notice and a hearing, in a written order making findings of fact and conclusions of law. An order imposing sanctions is reviewable by the superior court in accordance with G.S. 1-301.2 and G.S. 1-301.3, as applicable, and thereafter by the appellate courts in accordance with G.S. 7A-38. 1(g).

Rule 6. Authority and duties of mediators.**A. Authority of mediator.**

(1) *Control of the mediation.* The mediator shall at all times be in control of the mediation and the procedures to be followed. However, the mediator's conduct shall be governed by standards of conduct promulgated by the Supreme Court that shall contain a provision prohibiting mediators from prolonging a mediation unduly.

(2) *Private consultation.* The mediator may communicate privately with any participant or counsel prior to, during, and after the mediation. The fact that private communications have occurred with a participant before the conference shall be disclosed to all other participants at the beginning of the mediation.

B. Duties of mediator.

(1) The mediator shall define and describe the following at the beginning of the mediation:

- (a) The process of mediation;
- (b) The costs of the mediation and the circumstances in which participants will not be taxed with the costs of mediation;
- (c) That the mediation is not a trial, the mediator is not a judge, and the parties retain their right to a hearing if they do not reach settlement;
- (d) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;
- (e) Whether and under what conditions communications with the mediator will be held in confidence during the conference;
- (f) The inadmissibility of conduct and statements as provided by G.S. 7A-38.3B;
- (g) The duties and responsibilities of the mediator and the participants; and
- (h) That any agreement reached will be reached by mutual consent and reported to the Clerk as provided by rule.

(2) *Disclosure.* The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(3) *Declaring impasse.* It is the duty of the mediator to determine in a timely manner that an impasse exists and that the mediation should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the mediation.

(4) Reporting results of mediation.

(a) The mediator shall report to the court on an AOC form within 5 days of completion of the mediation whether or not the mediation resulted in a settlement or impasse. If settlement occurred prior to or during a recess of a mediation, the mediator shall file the report of settlement within 5 days of learning of the settlement and, in addition to the other information required, report who informed the mediator of the settlement.

(b) The mediator's report shall identify those persons attending the mediation, the time spent in and fees charged for mediation, and the names and contact information for those persons designated by the parties to file such consent judgment or dismissal(s) with the Clerk as required by Rule 4.B. Mediators shall provide statistical data for evaluation of the mediation program as required from time to time by the Dispute Resolution Commission or the Administrative Office of the Courts. Mediators shall not be required to send agreements reached in mediation to the Clerk, except in Estate and Guardianship matters and other matters which may be resolved only by order of the Clerk.

(c) Mediators who fail to report as required pursuant to this rule shall be subject to the contempt power of the court and sanctions.

(5) *Scheduling and holding the mediation.* It is the duty of the mediator to schedule the mediation and conduct it prior to the mediation completion deadline set out in the Clerk's order. The mediator shall make an effort to schedule the mediation at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the mediation. Deadlines for completion of the mediation shall be strictly observed by the mediator unless said time limit is charged by a written order of the Clerk of Superior Court.

(6) *Distribution of mediator evaluation form.* At the mediation, the mediator shall distribute a mediator evaluation form approved by the Dispute Resolution Commission. The mediator shall distribute one copy per person with additional copies distributed upon request. The evaluation is intended for purposes of self-improvement and the mediator shall review returned evaluation forms.

Rule 7. Compensation of the mediator.

A. *By agreement.* When the mediator is stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator.

B. *By order of the clerk.* When the mediator is appointed by the Clerk, the parties shall compensate the mediator for mediation services at the rate of \$125 per hour. The parties shall also pay to the mediator a onetime, per case administrative fee of \$125 that is due upon appointment.

C. *Payment of compensation.* In matters within the Clerk's jurisdiction that, as a matter of law, may be resolved by the parties by agreement, the mediator's fee shall be paid in equal shares by the parties unless otherwise agreed to by the parties. Payment shall be due upon completion of the mediation.

In all other matters before the Clerk, including guardianship and estate matters, the mediator's fee shall be paid in shares as determined by the Clerk. A share of a mediator's fee may only be assessed against the estate of a decedent, a trust or a guardianship or against a fiduciary or interested person upon the entry of a written order making specific written findings of fact justifying the taxing of costs.

D. *Change of appointed mediator.* Parties who fail to select a mediator within the time set out in the Clerk's order and then desire a substitution after the Clerk has appointed a mediator, shall obtain the approval of the Clerk for the substitution. If the Clerk approves the substitution, the parties shall pay the Clerk's original appointee the \$125 one time, per case administrative fee provided for in Rule 7.B. unless the Clerk determines that to do so would be unnecessary or inequitable.

E. *Indigent cases.* No person ordered to attend a mediation found to be indigent by the Clerk for the purposes of these rules shall be required to pay a share of the mediator's fee. Any person ordered by the Clerk of Superior Court to attend may move the Clerk for a finding of indigence and to be relieved of that person's obligation to pay a share of the mediator's fee. The motion shall be heard subsequent to the completion of the mediation or, if the parties do not settle their matter, subsequent to its conclusion. In ruling upon such motions, the Clerk shall apply the criteria enumerated in G.S. 1-110(a), but shall take into consideration the outcome of the matter and whether a decision was rendered in the movant's favor. The Clerk shall enter an order granting or denying the person's request. Any mediator conducting a mediation pursuant to these rules shall waive the payment of fees from persons found by the court to be indigent.

F. *Postponements.*

(1) As used herein, the term "postponement" shall mean reschedule or not proceed with mediation once the mediator has scheduled a date for a session of

the mediation. After mediation has been scheduled for a specific date, a person ordered to attend may not unilaterally postpone the mediation.

(2) A mediation session may be postponed by the mediator for good cause beyond the control of the movant only after notice by the movant to all persons of the reasons for the postponement and a finding of good cause by the mediator. A postponement fee shall not be charged in such circumstance.

(3) Without a finding of good cause, a mediator may also postpone a scheduled mediation session with the consent of all parties. A fee of \$125 shall be paid to the mediator if the postponement is allowed or if the request is within two (2) business days of the scheduled date the fee shall be \$250. The person responsible for it shall pay the postponement fee. If it is not possible to determine who is responsible, the Clerk shall assess responsibility. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B. A mediator shall not charge a postponement fee when the mediator is responsible for the postponement.

(4) If all persons ordered to attend select the mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

G. *Sanctions for failure to pay mediator's fee.* Willful failure of a party to make timely payment of a party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status to promptly move the Clerk of Superior Court for a finding of indigency, shall constitute contempt of court and may result, following notice and a hearing, in the imposition of any and all lawful sanctions by the Superior Court pursuant to G.S. 5A.

Rule 8. Mediator certification and decertification.

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed Clerk of Court mediators.

A. For appointment by the Clerk as mediator in all cases within the Clerk's jurisdiction except guardianship and estate matters, a person shall be certified by the Dispute Resolution Commission for either the superior or district court mediation programs;

B. For appointment by the Clerk as mediator in guardianship and estate matters within the Clerk's jurisdiction, a person shall be certified a mediator by the Dispute Resolution Commission for either the superior or district court programs and complete a course, at least 10 hours in length, approved by the Dispute Resolution Commission pursuant to Rule 9 concerning estate and guardianship matters within the Clerk's jurisdiction;

C. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission;

D. Pay all administrative fees established by the Administrative Office of the Courts upon the recommendation of the Dispute Resolution Commission; and

E. Agree to accept, as payment in full of a party's share of the mediator's fee, the fee ordered by the Clerk pursuant to Rule 7.

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any county in which he or she has served as a mediator or the Standards of Conduct. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

Rule 9. Certification of mediation training programs.

A. Certified training programs for mediators seeking certification pursuant to these Rules for estate and guardianship matters within the jurisdiction of the Clerk of Superior Court shall consist of a minimum of 10 hours instruction. The curriculum of such programs shall include:

- (1) Factors distinguishing estate and guardianship mediation from other types of mediations;
- (2) The aging process and societal attitudes toward the elderly, mentally ill, and disabled;
- (3) Ensuring full participation of Respondents and identifying interested persons and nonparty participants;
- (4) Medical concerns of the elderly, mentally ill and disabled;
- (5) Financial and accounting concerns in the administration of estates and of the elderly, mentally ill and disabled;
- (6) Family dynamics relative to the elderly, mentally ill, and disabled and to the families of deceased persons;
- (7) Assessing physical and mental capacity;
- (8) Availability of community resources for the elderly, mentally ill and disabled;
- (9) Principles of guardianship law and procedure;
- (10) Principles of estate law and procedure;
- (11) Statute, Rules, and forms applicable to mediation conducted under these Rules; and
- (12) Ethical and conduct issues in mediations conducted under these Rules.

The Commission may adopt Guidelines for trainers amplifying the above topics and set out minimum time frames and materials that trainers shall allocate to each topic. Any such Guidelines shall be available at the Commission's office and posted on its web site.

B. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.B. Certification need not be given in advance of attendance. Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule.

C. To complete certification, a training program shall pay all administrative fees established by the Administrative Office of the Courts in consultation with the Dispute Resolution Commission.

Rule 10. Procedural details.

The Clerk of Superior Court shall make all those orders just and necessary to safeguard the interests of all persons and may supplement all necessary procedural details not inconsistent with these Rules.

Rule 11. Definitions.

A. The term, Clerk of Superior Court, as used throughout these rules, shall refer both to said Clerk or Assistant Clerk.

B. The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by the Administrative Office of the Courts. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution Commission.

Rule 12. Time limits.

Any time limit provided for by these Rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the Rules of Civil Procedure.

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RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING THE ELECTRIC SUPPLIER TERRITORIAL DISPUTE MEDIATION PROGRAM

Adopted January 26, 2006.

Rule

1. Submission of dispute to electric supplier territorial dispute mediation.
2. Exemption from G.S. 7A-38.1.
3. Selection of mediator.
4. The electric supplier territorial dispute mediation.
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9. Resolution of the territorial dispute by a member of the public staff.
10. Certification and decertification of mediators of electric supplier territorial disputes.
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Rule 1. Submission of dispute to electric supplier territorial dispute mediation.

A. Mediation shall be initiated by the filing of a Request for Electric Supplier Mediation of Territorial Dispute (Request) with the Clerk of Superior Court in a county in which an action may have been brought but for the provisions of G.S. 7A-38.3C¹. The Request shall be on a form prescribed by the Administrative Office of the Courts and be available through the Clerk of Superior Court. The party filing the Request shall mail a copy of the Request by certified mail, return receipt requested, to each party to the dispute. Copies of the Request also shall be filed with the North Carolina Utilities Commission and served on the Executive Director of the Public Staff of the North Carolina Utilities Commission.

B. The Clerk of Superior Court shall file the Request and shall open a Special Proceeding under the name of the requesting party. The provisions set forth herein in Rules 1 through 10 shall apply to all Electric Supplier Territorial Dispute Mediations in lieu of any other rules applicable to Special Proceedings.

Rule 2. Exemption from G.S. 7A-38.1.

A dispute mediated pursuant to G.S. 7A-38.3C shall be exempt from an order referring the dispute to a mediated settlement conference entered pursuant to G.S. 7A-38.1 should a voluntary or mandatory mediation be unsuccessful.

Rule 3. Selection of mediator.

A. Time period for selection.

The parties to the dispute shall have seven (7) days from the date of the filing of the Request to select by agreement a mediator to conduct their mediation and to file a Notice of Selection of Mediator by Agreement.

¹Enacted as G.S. 7A-38.3B, but codified as G.S. 7A-38.3C.

B. Selection of certified mediator by agreement.

The Clerk shall make available to each party to the dispute named in the Request a list of mediators certified by the Dispute Resolution Commission to conduct mediated settlement conferences in Superior Court civil actions. If the parties are able to agree in writing on a mediator from that list to conduct their mediation, the party who filed the Request shall notify the Clerk by filing with the Clerk a Notice of Selection of Mediator by Agreement and the Clerk shall appoint the mediator selected by the parties. Such notice shall state the name, address and telephone number of the certified mediator selected; state the rate of compensation to be paid the mediator; and state at the mediator and the parties to the dispute have agreed on the selection and the rate of compensation. The notice shall be on a form prepared and distributed by the Administrative Office of the Courts and available through the Clerk of Superior Court in the county in which the Request was filed.

C. Court appointment of mediator.

If the parties to the dispute cannot agree on selection of a mediator within the required time period, the party who filed the Request shall file with the Clerk a Motion for Court Appointment of Mediator and the Senior Resident Superior Court Judge shall appoint a certified mediator. The Motion shall be filed with the Clerk within 10 days of the date of the filing of the Request. The motion shall be on a form prepared and distributed by the Administrative Office of the Courts and available through the Clerk of Superior Court in the county in which the Request was filed.

D. Mediator information directory.

To assist parties in learning more about the qualifications and experience of mediators, the Clerk of Superior Court in the county in which the Request was filed shall make available to the disputing parties named in the Request a central directory of information on all persons certified to conduct mediated settlement conferences in Superior Court civil actions who wish to mediate cases in that county, including those who wish to mediate electric supplier territorial disputes. The Dispute Resolution Commission shall be responsible for distributing and updating the directory.

E. Disqualification of mediator.

Any party may move the Senior Resident Superior Court Judge of the district where the mediation is pending for an order disqualifying the mediator, regardless of whether the mediator was selected by agreement or was appointed by the Court. For good cause and after a hearing, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to this Rule 3. Nothing in this provision shall preclude mediators from disqualifying themselves.

Rule 4. The electric supplier territorial dispute mediation.**A. When mediation is to be completed.**

The mediation shall be convened and completed within thirty (30) days of the Notice of Selection of Mediator by Agreement or the date of entry of the order appointing a mediator to conduct the mediation.

B. Extensions.

A party or the mediator may file a motion with the Clerk seeking to extend the 30 day period set forth in subpart A above. Such request shall state the reasons the extension is sought and explain why the mediation cannot be completed within thirty (30) days of the mediator's appointment. The Senior Resident Superior Court Judge may grant the motion by entering a written order establishing a new date, which date shall be not more than thirty (30) days after the original date for completion of the mediation as provided for in subpart A above.

C. Where the conference is to be held.

Unless all parties and the mediator agree otherwise, the mediation shall be held in the courthouse or other public or community building in the county where the Request was filed. The mediator shall be responsible for reserving a place and making arrangements for the mediation and for giving timely notice of the date, time and location of the mediation to all parties named in the Request or their attorneys.

D. Recesses.

The mediator may recess the mediation at any time and may set a time for reconvening, except at such time for reconvening shall fall within the original thirty (30) day period provided for in subpart A above, or if extended pursuant to subpart B above, within the sixty (60) day period after the filing of the Notice of Selection of Mediator by Agreement or the date of entry of the order appointing a mediator. No further notification is required for persons present at the recessed mediation session.

E. Duties of parties, attorneys and other participants.

Rule 4 of the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.

F. Sanctions for failure to attend.

Rule 5 of the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.

Rule 5. Authority and duties of the mediator.

A. Authority of mediator.

(1) Control of mediation.

The mediator shall at all times be in control of the mediation and the procedures to be followed. The mediator's conduct is governed by standards of conduct promulgated by the Supreme Court and governing the conduct of persons certified to conduct mediated settlement conferences in Superior Court civil actions.

(2) Private consultation.

The mediator may communicate privately with any participant or counsel prior to and during the mediation. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.

(3) Scheduling the conference.

The mediator shall make a good faith effort to schedule the conference at a time that is convenient for the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

B. Duties of mediator.

(1) The mediator shall define and describe the following at the beginning of the mediation:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of mediation;

(d) The fact that the mediation is not a trial, the mediator is not a judge and that the parties may not pursue their dispute in court if mediation is not successful because, pursuant to the provisions of G.S. 7A-38.3C(i), it will be decided by a member of the Public Staff of the North Carolina Utilities Commission in a decision that is binding on the parties named in the Request;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether or under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.3C and G.S. 7A-38.1(1);

- (h) The duties and responsibilities of the mediator and the participants; and
 - (i) The fact that any agreement reached will be reached by mutual consent.
- (2) Disclosure.

The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

- (3) Declaring impasse.

It is the duty of the mediator to determine timely that an impasse exists and that the mediation should end.

- (4) Scheduling and holding the conference.

It is the duty of the mediator to schedule the mediation and to conduct it within the time frame established by Rule 4 above. Rule 4 shall be strictly observed by the mediator.

Rule 6. Compensation of the mediator.

A. By agreement.

When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator.

B. By court order.

When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of \$125.00 per hour. The parties shall also pay to the mediator a onetime, per case administrative fee of \$125.00, which is due upon appointment.

C. Change of appointed mediator;

Pursuant to Rule 3.A., the parties have seven (7) days to select a mediator. Parties who fail to select a mediator within that time frame and then desire a substitution after the court has appointed a mediator, shall obtain court approval for the substitution. If the court approves the substitution, the parties shall pay the court's original appointee the \$125.00 one time, per case administrative fee provided for in Rule 6.B.

D. Postponements and Fees.

(1) As used herein, the term "postponement" shall mean rescheduling or not proceeding with a mediation conference once a date for a mediation session has been scheduled by the mediator. After a mediation conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.

(2) A conference session may be postponed by the mediator for good cause beyond the control of the moving participant(s) only after notice by the movant to all parties of the reasons for the postponement and a finding of good cause by the mediator.

(3) Without a finding of good cause, a mediator may also postpone a scheduled conference session with the consent of all parties. A fee of \$125.00 shall be paid to the mediator if the postponement is allowed, or if the request is within five (5) business days of the scheduled date the fee shall be \$250.00. The postponement fee shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 6.B.

(4) If all parties select or nominate the mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

E. Payment of compensation by parties.

Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties or their counsel. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the

mediation. Mediators may be compensated for travel time, mileage, or any other out-of-pocket expenses regardless of whether they are appointed by the court or selected by the parties.

F. Sanctions for failure to pay mediator's fee.

Willful failure of a party or their counsel to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services, or any postponement fee) shall constitute contempt of court and may result, following notice, in a hearing and the imposition of any and all lawful sanctions by a Resident or Presiding Superior Court Judge.

DRC Comment to Rule 6.D. — Though Rule 6.D. provides that mediators "shall" assess the postponement fee, it is understood there may be rare situations where the circumstances occasioning a request for a postponement are beyond the control of the parties, for example, an illness, serious accident, expected and unavoidable trial conflict. When the party or parties take steps to notify the mediator as soon as possible in such circumstances, the mediator, may, in his or her discretion, waive the postponement fee.

Non-essential requests for postponements work a hardship on parties and mediators, and potentially members of the public, and serve only to inject delay into a process and program designed to expedite the resolution of electric supplier territorial disputes. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their

judgment, the mediation could be held as scheduled, or the public interest likely will be adversely affected.

DRC Comment to Rule 6.E. — If a party is found by a Senior Resident Superior Court Judge to have failed to attend a mediated settlement conference without good cause, then the Court may require that party to pay the mediator's fee and related expenses.

DRC Comment to Rule 6.F. — If the Mediated Settlement Conference Program is to be successful, it is essential that mediators, both party-selected and court-appointed, be compensated for their services. Rule 6.F. is intended to give the court express authority to enforce payment of fees owed both court-appointed and party-selected mediators. In instances where the mediator is party-selected, the court may enforce agreements as to fees which exceed the caps set forth in 6.B. (hourly fee and administrative fee) and 6.D. (postponement/cancellation fee).

Rule 7. Waiver of mediation.

All parties to a territorial dispute, acting jointly, may waive voluntary or mandatory mediation pursuant to G.S. 7A-38.3C by informing the mediator of their waiver in writing. The Waiver of Mediation in Electric Supplier Territorial Disputes shall be on a form prescribed by the Administrative Office of the Courts and available through the Clerk. The party who requested mediation shall be responsible for obtaining the written consent to waiver from all parties named in the Request, and shall file the waiver with the Clerk and mail a copy to the mediator and all parties named in the Request.

Rule 8. Mediator's certification that mediation concluded.

A. Contents of certification.

Following the conclusion of mediation or the receipt of a joint waiver of mediation signed by all parties named in the Request, the mediator shall prepare a Mediator's Certification in Electric Supplier Territorial Dispute on a form prescribed by the Administrative Office of the Courts. If a mediation conference was convened, the certification shall state the date on which the mediation was concluded by impasse or settlement, and report the general results. If a mediation conference was not held, the certification shall state why the mediation was not held and identify any parties named in the Request who failed to attend or participate in mediation or shall state that all parties waived mediation in writing pursuant to Rule 7 above.

B. Deadline for filing mediator's certification.

The mediator shall file the completed certification with the Clerk within five (5) days of the completion of the mediation, the failure of the mediation to be held or the receipt of a jointly signed waiver of mediation. If the certification reports an impasse, a waiver, or a failure of the mediation to be held, the mediator shall also file, by mail or delivery, a copy of the completed certification with the Clerk of the North Carolina Utilities Commission and serve, by mail or delivery, a copy on the Executive Director of the Public Staff of the North Carolina Utilities Commission within five (5) days of the completion of the mediation, the receipt of the joint waiver, or the failure to hold the mediation within the applicable period of time provided for in Rule 4. The mediator also shall serve a copy of the certification on each of the parties named in the Request.

Rule 9. Resolution of the territorial dispute by a member of the public staff.

A. Nomination or appointment of a member of the Public Staff to hear the territorial dispute.

Within five (5) days of receipt by the Clerk of the North Carolina Utilities Commission of the certification from the mediator reporting an impasse, a waiver, or a failure of the mediation to be held, the parties shall agree on the selection of a member of the Public Staff to hear and decide the territorial dispute (the "Hearing Officer") pursuant to the provisions of G.S. 7A-38.3C(i), file with the Clerk of the North Carolina Utilities Commission a Notice of Selection of Hearing Officer by Agreement, and serve a copy of said Notice on the Executive Director of the Public Staff. In the event the parties do not agree on a member of the Public Staff within such five (5) day period, the Executive Director of the Public Staff shall appoint a member of the Public Staff as the Hearing Officer, and shall file a Notice of Appointment of Hearing Officer with the Clerk of the North Carolina Utilities Commission, who shall serve a copy of said Notice on each of the parties. The Notice of Selection of Hearing Officer and the Notice of Appointment of Hearing Officer shall be on a form prescribed by the Administrative Office of the Courts and be available through the Clerk of Superior Court.

B. Scheduling and location of the hearing.

The Hearing Officer shall make a good faith effort to schedule the hearing at a time that is convenient for the participants, attorneys and the Hearing Officer. In the absence of the agreement of all parties, the Hearing Officer shall select the date for the hearing. Unless the parties otherwise agree, the location of the hearing shall be at a place in Raleigh, North Carolina designated by the Hearing Officer.

C. Duties of the member of the Public Staff.

(1) The Hearing Officer shall have such powers as are conferred upon arbitrators under Article 45C of Chapter 1 of the General Statutes not inconsistent with the provisions of G.S. 7A-38.3C or these Rules. The Hearing Officer shall meet in person or by phone with counsel for the parties at least five (5) working days before the hearing is scheduled to convene to determine the procedures that will be followed in the hearing and the remainder of the proceeding. The Hearing Officer also shall define and describe the following at the beginning of the hearing:

- (a) The procedure to be followed at the hearing;
- (b) The fact that the Hearing Officer will make a decision that will be binding on the participants; and
- (c) The time allotted to each party to present its position on the territorial dispute and the extent to which the Hearing Officer will review documentation or other evidence submitted by the parties.

(2) Disclosure.

The Hearing Officer has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(3) Issuance of a binding opinion.

It shall be the duty of the Hearing Officer to issue a written opinion resolving the territorial dispute as soon as practicable, but not later than forty-five (45) days of receipt by the Clerk of the Utilities Commission of the certification from the mediator. The opinion issued by the Hearing Officer shall be binding on the participants.

(4) Written opinion of the Hearing Officer.

The Hearing Officer shall prepare a written opinion resolving the territorial dispute, file it with the Clerk of Superior Court in the county in which the Request was filed, file it with the Clerk of the North Carolina Utilities Commission, and deliver it to all of the participants and their counsel.

(5) Modification or correction and enforcement of the opinion.

The opinion of the Hearing Officer shall be considered in the nature of an arbitration award and may be modified or corrected and enforced only in the manner of an arbitrator's award under G.S. 1-569.24 and 1-569.25.

Rule 10. Certification and decertification of mediators of electric supplier territorial disputes.

Mediators who conduct mediation of Electric Supplier Territorial Disputes shall be subject to all rules and regulations regarding certification, conduct, discipline and decertification applicable to mediators serving the Mediated Settlement Conferences Program and any such additional rules and regulations as adopted by the Dispute Resolution Commission and applicable to mediators certified to conduct mediated settlement conferences in Superior Court civil actions.

Rule 11. Certification of mediation training programs.

The Dispute Resolution Commission may specify a curriculum for an Electric Supplier Territorial Dispute Mediation training program and may set qualifications for trainers.

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RULES IMPLEMENTING SETTLEMENT PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES

Adopted Pursuant to G.S. 7A-38.4A
Effective October 16, 2001,
with amendments received effective March 1, 2006.

Rule	Rule
1. Initiating settlement procedures.	8. Mediator certification and decertification.
2. Selection of mediator.	10. Other settlement procedures.
4. Duties of parties, attorneys and other participants in mediated settlement conferences.	Index follows Rules.

Rule 1. Initiating settlement procedures.

A. *Purpose of mandatory settlement procedures.* Pursuant to G.S. 7A-38.4A, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the Court pursuant to these Rules.

B. *Duty of counsel to consult with clients and opposing counsel concerning settlement procedures.* In furtherance of this purpose, counsel, upon being retained to represent any party to a district court case involving family financial issues, including equitable distribution, child support, alimony, post-separation support action, or claims arising out of contracts between the parties under G.S. 50-20(d), 52-10, 52-10.1 or 52 B shall advise his or her client regarding the settlement procedures approved by these Rules and, at or prior to the scheduling conference mandated by G.S. 50-21(d), shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

C. *Ordering settlement procedures.*

(1) *Equitable distribution scheduling conference.* At the scheduling conference mandated by G.S. 50-21(d) in all equitable distribution actions in all judicial districts, or at such earlier time as specified by local rule, the Court shall include in its scheduling order a requirement that the parties and their counsel attend a mediated settlement conference or, if the parties agree, other settlement procedure conducted pursuant to these rules, unless excused by the Court pursuant to Rule 1.C.(6) or by the Court or mediator pursuant to Rule 4.A.(2). The court shall dispense with the requirement to attend a mediated settlement conference or other settlement procedure only for good cause shown.

(2) *Scope of settlement proceedings.* All other financial issues existing between the parties when the equitable distribution settlement proceeding is ordered, or at any time thereafter, may be discussed, negotiated or decided at the proceeding. In those districts where a child custody and visitation mediation program has been established pursuant to G.S. 7A-494, child custody and visitation issues may be the subject of settlement proceedings

ordered pursuant to these Rules only in those cases in which the parties and the mediator have agreed to include them and in which the parties have been exempted from, or have fulfilled the program requirements. In those districts where a child custody and visitation mediation program has not been established pursuant to G.S. 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules with the agreement of all parties and the mediator.

(3) *Authorizing settlement procedures other than mediated settlement conference.* The parties and their attorneys are in the best position to know which settlement procedure is appropriate for their case. Therefore, the Court shall order the use of a settlement procedure authorized by Rules 10-12 herein or by local rules of the District Court in the county or district where the action is pending if the parties have agreed upon the procedure to be used, the neutral to be employed and the compensation of the neutral. If the parties have not agreed on all three items, then the Court shall order the parties and their counsel to attend a mediated settlement conference conducted pursuant to these Rules.

The motion for an order to use a settlement procedure other than a mediated settlement conference shall be submitted on an AOC form at the scheduling conference and shall state:

- (a) the settlement procedure chosen by the parties;
- (b) the name, address and telephone number of the neutral selected by the parties;
- (c) the rate of compensation of the neutral;
- (d) that all parties consent to the motion.

(4) *Content of order.* The Court's order shall (1) require the mediated settlement conference or other settlement proceeding be held in the case; (2) establish a deadline for the completion of the conference or proceeding; and (3) state that the parties shall be required to pay the neutral's fee at the conclusion of the settlement conference or proceeding unless otherwise ordered by the Court. Where the settlement proceeding ordered is a judicial settlement conference, the parties shall not be required to pay for the neutral.

The order shall be contained in the Court's scheduling order, or, if no scheduling order is entered, shall be on an AOC form. Any scheduling order entered at the completion of a scheduling conference held pursuant to local rule may be signed by the parties or their attorneys in lieu of submitting the forms referred to hereinafter relating to the selection of a mediator.

(5) *Court-ordered settlement procedures in other family financial cases.* Any party to an action involving family financial issues not previously ordered to a mediated settlement conference may move the Court to order the parties to participate in a settlement procedure. Such motion shall be made in writing, state the reasons why the order should be allowed and be served on the non-moving party. Any objection to the motion or any request for hearing shall be filed in writing with the Court within 10 days after the date of the service of the motion. Thereafter, the Judge shall rule upon the motion and notify the parties or their attorneys of the ruling. If the Court orders a settlement proceeding, then the proceeding shall be a mediated settlement conference conducted pursuant to these Rules. Other settlement procedures may be ordered if the circumstances outlined in subsection (3) above have been met.

(6) *Motion to dispense with settlement procedures.* A party may move the Court to dispense with the mediated settlement conference or other settlement procedure. Such motion shall be in writing and shall state the reasons the relief is sought. For good cause shown, the Court may grant the motion. Such good cause may include, but not be limited to, the fact that the parties have participated in a settlement procedure such as nonbinding arbitration or early neutral evaluation prior to the court's order to participate in a mediated

settlement conference or have elected to resolve their case through arbitration under the Family Law Arbitration Act (G.S. 50-41 et seq) or that one of the parties has alleged domestic violence. The Court may also dispense with the mediated settlement conference for good cause upon its own motion or by local rule. (Adopted effective October 16, 2001; amended effective March 1, 2006.)

Rule 2. Selection of mediator.

A. Selection of certified family financial mediator by agreement of the parties. The parties may select a certified family financial mediator certified pursuant to these Rules by agreement by filing with the Court a Designation of Mediator by Agreement at the scheduling conference. Such designation shall: state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules.

In the event the parties wish to select a mediator who is not certified pursuant to these Rules, the parties may nominate said person by filing a Nomination of Non-Certified Family Financial Mediator with the Court at the scheduling conference. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience, or other qualifications of the mediator; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation, if any. The Court shall approve said nomination if, in the Court's opinion, the nominee is qualified to serve as mediator and the parties and the nominee have agreed upon the rate of compensation.

Designations of mediators and nominations of mediators shall be made on an AOC form. A copy of each such form submitted to the Court and a copy of the Court's order requiring a mediated settlement conference shall be delivered to the mediator by the parties.

B. Appointment of certified family financial mediator by the court. If the parties cannot agree upon the selection of a mediator, they shall so notify the Court and request that the Court appoint a mediator. The motion shall be filed at the scheduling conference and shall state that the attorneys for the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree on a mediator. The motion shall be on a form approved by the Administrative Office of the Courts.

Upon receipt of a motion to appoint a mediator, or failure of the parties to file a Notice of Selection with the court, the Court shall appoint a family financial mediator, certified pursuant to these Rules, who has expressed a willingness to mediate actions within the Court's district.

In making such appointments, the Court shall rotate through the list of available certified mediators. Appointments shall be made without regard to race, gender, religious affiliation, or whether the mediator is a licensed attorney. Certified mediators who do not reside in the judicial district, or a county contiguous to the judicial district, shall be included in the list of mediators available for appointment only if, on an annual basis, they inform the Judge in writing that they agree to mediate cases to which they are assigned. The District Court Judges shall retain discretion to depart in a specific case from a strict rotation when, in the judge's discretion, there is good cause to do so.

The Dispute Resolution Commission shall furnish to the District Court Judges of each judicial district a list of those certified family financial mediators requesting appointments in that district. That list shall contain the mediators' names, addresses and telephone numbers and shall be provided both in writing and electronically through the Commission's website. The

Commission shall promptly notify the District Court Judges of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

C. *Mediator information directory.* To assist the parties in the selection of a mediator by agreement, the Chief District Court Judge having authority over any county participating in the mediated settlement conference program shall prepare and keep current for such county a central directory of information on all mediators certified pursuant to these Rules who wish to mediate in that county. Such information shall be collected on loose leaf forms provided by the Dispute Resolution Commission and be kept in one or more notebooks made available for inspection by attorneys and parties in the office of the Clerk of Court in such county and the office of the Chief District Court Judge or Trial Court Administrator in such county or, in a single county district, in the office of the Chief District Court Judge or said judge's designee.

D. *Disqualification of mediator.* Any party may move a Court of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves. (Adopted effective October 16, 2001; amended effective March 1, 2006.)

Rule 4. Duties of parties, attorneys and other participants in mediated settlement conferences.

A. Attendance.

(1) The following persons shall attend a mediated settlement conference:

(a) *Parties.*

(b) *Attorneys.* At least one counsel of record for each party whose counsel has appeared in the action.

(2) Any person required to attend a mediated settlement conference shall physically attend until such time as an agreement has been reached or the mediator, after conferring with the parties and their counsel, if any, declares an impasse. No mediator shall prolong a conference unduly.

Any such person may have the attendance requirement excused or modified, including allowing a person to participate by phone, by agreement of both parties and the mediator or by order of the Court. Ordinarily, attorneys for the parties may be excused from attending only after they have appeared at the first session.

(3) *Scheduling.* Participants required to attend shall promptly notify the mediator after selection or appointment of any significant problems they may have with dates for conference sessions before the completion deadline, and shall keep the mediator informed as to such problems as may arise before an anticipated conference session is scheduled by the mediator. After a conference session has been scheduled by the mediator, and a scheduling conflict with another court proceeding thereafter arises, participants shall promptly attempt to resolve it pursuant to Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina June 20, 1985.

B. Finalizing Agreement.

(1) If an agreement is reached on any or all issues at the conference, the essential terms of the parties' agreement shall be reduced to writing as a summary memorandum at the conclusion of the conference unless the parties have reduced their agreement to writing, have signed it and in all other respects have complied with the requirements of Chapter 50 of the General Statutes. The parties and their counsel shall use the summary memorandum

as a guide to drafting such agreements and orders as may be required to give legal effect to the its terms. In the event the parties fail to agree on the wording or terms of a final agreement or court order, the mediator may schedule another session if the mediator determines that it would assist the parties.

(2) If the agreement is upon all issues at the conference, the person(s) responsible for filing closing documents with the court shall also sign the mediator's report to the court. The parties shall give a copy of their signed memorandum of agreement, agreement, consent judgment or voluntary dismissals to the mediator and all parties at the conference and shall file their consent judgment or voluntary dismissal with the court within thirty (30) days or before expiration of the mediation deadline, whichever is longer.

(3) If an agreement is reached upon all issues prior to the conference or finalized while the conference is in recess, the parties shall reduce its terms to writing, sign it along with their counsel and file the consent judgment or voluntary dismissal(s) with the court within thirty (30) days or before the expiration of the mediation deadline, whichever is longer.

(4) When a case is settled upon all issues, all attorneys of record must notify the Court within four business days of the settlement and advise who will file the consent judgment or voluntary dismissal(s), *and when*.

C. *Payment of mediator's fee.* The parties shall pay the mediator's fee as provided by Rule 7. (Adopted effective October 16, 2001; amended March 4, 2004; amended March 1, 2006.)

Rule 8. Mediator certification and decertification.

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as family financial mediators. For certification, a person must have complied with the requirements in each of the following sections.

A. Training and experience.

1. Be an Advanced Practitioner member of the Association for Conflict Resolution who is subject to requirements equivalent to those in effect for Practitioner Members of the Academy of Family Mediators immediately prior to its merger with other organizations to become the Association for Conflict Resolution and possess a four-year college degree from an accredited institution, except that the four-year degree requirement shall not be applicable to mediators certified prior to January 1, 2005.

2. Be an attorney and/or judge for at least five years who is either:

(a) a member in good standing of the North Carolina State Bar, pursuant to Title 27, N.C. Administrative Code. The N.C. State Bar, Chapter 1, Subchapter A, Section .0201(b) or Section .0201(c)(1), as those rules existed January 1, 2000; or

(b) a member similarly in good standing of the Bar of another state and a graduate of a law school recognized as accredited by the North Carolina Board of Law Examiners; demonstrates familiarity with North Carolina court structure, legal terminology and civil procedure; and provides to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's practice as an attorney.

and who has completed either:

(c) a 40 hour family and divorce mediation training approved by the Dispute Resolution Commission pursuant to Rule 9; or

(d) a 16 hour supplemental family and divorce mediation training approved by the Dispute Resolution Commission pursuant to Rule 9, after having been certified as a Superior Court mediator by that Commission.

B. If not licensed to practice law in one of the United States, have completed a six hour training on North Carolina legal terminology, court structure and

civil procedure provided by a trainer certified by the Dispute Resolution Commission; and have observed with the permission of the parties as a neutral observer two mediated settlement conferences ordered by a Superior Court, the North Carolina Office of Administrative Hearings, Industrial Commission or the US District Courts for North Carolina, and conducted by a certified Superior Court mediator.

C. Be a member in good standing of the State Bar of one of the United States as required by Rule 8.A. or have provided to the Dispute Resolution Commission three letters of reference as to the applicant's good character and experience.

D. Have observed with the permission of the parties two mediated settlement conferences as a neutral observer which involve custody or family financial issues and which are conducted by a mediator who is certified pursuant to these rules, who is an Advanced Practitioner Member of the Association for Conflict Resolution and subject to requirements equivalent to those in effect for Practitioner Members of the Academy of Family Mediators immediately prior to its merger with other organizations to become the Association for Conflict Resolution, or who is an A.O.C. mediator.

E. Demonstrate familiarity with the statutes, rules, and standards of practice and conduct governing mediated settlement conferences conducted pursuant to these Rules.

F. Be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court. Applicants for certification and recertification and all certified family financial mediators shall report to the Commission any criminal convictions, disbarments or other disciplinary complaints and actions as soon as the applicant or mediator has notice of them. Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule.

G. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission.

H. Pay all administrative fees established by the Administrative Office of the Court in consultation with the Dispute Resolution Commission.

I. Agree to accept as payment in full of a party's share of the mediator's fee as ordered by the Court pursuant to Rule 7.

J. Comply with the requirements of the Dispute Resolution Commission for continuing mediator education or training. (These requirements may include advanced divorce mediation training, attendance at conferences or seminars relating to mediation skills or process, and consultation with other family and divorce mediators about cases actually mediated. Mediators seeking recertification beyond one year from the date of initial certification may also be required to demonstrate that they have completed 8 hours of family law training, including tax issues relevant to divorce and property distribution, and 8 hours of training in family dynamics, child development and interpersonal relations at any time prior to that recertification.) Mediators shall report on a Commission approved form.

Certification may be revoked or not renewed at any time if it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

Certification of mediators who have been certified as family financial mediators by the Dispute Resolution Commission prior to the adoption of these Rules may not be revoked or not renewed solely because they do not meet the experience and training requirements in Rule 8. (Adopted effective October 16, 2001; amended November 21, 2002; amended March 1, 2006.)

Rule 10. Other settlement procedures.

A. *Order authorizing other settlement procedures.* Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the Court may order the use of those procedures listed in Rule 10.B. unless the Court finds: that the parties did not agree upon the procedure to be utilized, the neutral to conduct it, or the neutral's compensation; or that the procedure selected is not appropriate for the case or the parties. Judicial settlement conferences may be ordered only if permitted by local rule.

B. *Other settlement procedures authorized by these rules.* In addition to mediated settlement conferences, the following settlement procedures are authorized by these Rules:

(1) Neutral Evaluation (Rule 11), in which a neutral offers an advisory evaluation of the case following summary presentations by each party.

(2) Judicial Settlement Conference (Rule 12), in which a District Court Judge assists the parties in reaching their own settlement, if allowed by local rules.

(3) Other Settlement Procedures described and authorized by local rule pursuant to Rule 13.

The parties may agree to use arbitration under the Family Law Arbitration Act (G.S. 50-41 et seq) which shall constitute good cause for the court to dispense with settlement procedures authorized by these rules (Rule 1.C.6).

C. *General rules applicable to other settlement procedures.*

(1) *When proceeding is conducted.* The neutral shall schedule the conference and conduct it no later than 150 days from the issuance of the Court's order or no later than the deadline for completion set out in the Court's order, unless extended by the Court. The neutral shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the neutral shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the Court.

(2) *Extensions of time.* A party or a neutral may request the Court to extend the deadlines for completion of the settlement procedure. A request for an extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. The Court may grant the extension and enter an order setting a new deadline for completion of the settlement procedure. Said order shall be delivered to all parties and the neutral by the person who sought the extension.

(3) *Where procedure is conducted.* Settlement proceedings shall be held in any location agreeable to the parties. If the parties cannot agree to a location, the neutral shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.

(4) *No delay of other proceedings.* Settlement proceedings shall not be cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Court.

(5) *Inadmissibility of settlement proceedings.* Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except:

(a) In proceedings for sanctions under this section;

(b) In proceedings to enforce or rescind a settlement of the action;

(c) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or others neutrals; or

(d) In proceedings to enforce laws concerning juvenile or elder abuse. As used in this subsection, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at the proceeding conducted under this section or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties and in all other respects complies with the requirements of Chapter 50 of the General Statutes. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No mediator, other neutral, or neutral observer present at a settlement proceeding under this section, shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to a mediated settlement conference or other settlement proceeding pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.

(6) *No record made.* There shall be no stenographic or other record made of any proceedings under these Rules.

(7) *Ex parte communication prohibited.* Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.

(8) *Duties of the parties.*

(a) *Attendance.* All parties and attorneys shall attend other settlement procedures authorized by Rule 10 and ordered by the Court.

(b) *Finalizing agreement.*

(i) If agreement is reached on all issues at the neutral evaluation, judicial settlement conference, or other settlement procedure, the essential terms of the agreement shall be reduced to writing as a summary memorandum unless the parties have reduced their agreement to writing, signed it and in all other respects have complied with the requirements of Chapter 50 of the General Statutes. The parties and their counsel shall use the summary memorandum as a guide to drafting such agreements and orders as may be required to give legal effect to its terms. Within thirty (30) days of the proceeding, all final agreements and other dispositive documents shall be executed by the parties and notarized, and judgments or voluntary dismissals shall be filed with the Court by such persons as the parties or the Court shall designate.

(ii) If an agreement is reached upon all issues prior to the neutral evaluation, judicial settlement conference, or other settlement procedure or finalized while the proceeding is in recess, the parties shall reduce its terms to writing and sign it along with their counsel, shall comply in all respects with the requirements of Chapter 50 of the General Statutes, and shall file a consent judgment or voluntary dismissals(s) disposing of all issues with the Court within thirty (30) days, or before the expiration of the deadline for completion of the proceeding, whichever is longer.

(iii) When a case is settled upon all issues, all attorneys of record must notify the Court within four business days of the settlement and advise who will sign the consent judgment or voluntary dismissal(s), and when.

(c) *Payment of neutral's fee.* The parties shall pay the neutral's fee as provided by Rule 10.C.(12), except that no payment shall be required or paid for a judicial settlement conference.

(9) *Sanctions for failure to attend other settlement procedures.* If any person required to attend a settlement proceeding fails to attend without good cause, the Court may impose upon that person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, neutral fees, expenses and loss of earnings incurred by persons attending the conference.

A party to the action, or the Court on its own motion, seeking sanctions against a party or attorney, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the Court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

(10) *Selection of neutrals in other settlement procedures.*

Selection by agreement. The parties may select any person whom they believe can assist them with the settlement of their case to serve as a neutral in any settlement procedure authorized by these rules, except for judicial settlement conferences.

Notice of such selection shall be given to the Court and to the neutral through the filing of a motion to authorize the use of other settlement procedures at the scheduling conference or the court appearance when settlement procedures are considered by the Court. The notice shall be on an AOC form as set out in Rule 2 herein. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

If the parties are unable to select a neutral by agreement, then the Court shall deny the motion for authorization to use another settlement procedure and the court shall order the parties to attend a mediated settlement conference.

(11) *Disqualification of neutrals.* Any party may move a Court of the district in which an action is pending for an order disqualifying the neutral; and, for good cause, such order shall be entered. Cause shall exist, but is not limited to circumstances where, if the selected neutral has violated any standard of conduct of the State Bar or any standard of conduct for neutrals that may be adopted by the Supreme Court.

(12) *Compensation of neutrals.* A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparation for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time. The parties shall not compensate a settlement judge.

(13) *Authority and duties of neutrals.*

(a) *Authority of neutrals.*

(i) *Control of proceeding.* The neutral shall at all times be in control of the proceeding and the procedures to be followed.

(ii) *Scheduling the proceeding.* The neutral shall make a good faith effort to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral. In the absence of agreement, the neutral shall select the date and time for the proceeding. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the Court.

(b) *Duties of neutrals.*

(i) The neutral shall define and describe the following at the beginning of the proceeding:

(a) The process of the proceeding;

(b) The differences between the proceeding and other forms of conflict resolution;

- (c) The costs of the proceeding;
- (d) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1(1) and Rule 10.C.(6) herein; and
- (e) The duties and responsibilities of the neutral and the participants;
- (ii) *Disclosure*. The neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.
- (iii) *Reporting results of the proceeding*. The neutral evaluator, settlement judge, or other neutral shall report the result of the proceeding to the Court in writing within ten (10) days in accordance with the provisions of Rules 11 and 12 herein on an AOC form. The Administrative Office of the Courts, in consultation with the Dispute Resolution Commission, may require the neutral to provide statistical data for evaluation of other settlement procedures.
- (iv) *Scheduling and holding the proceeding*. It is the duty of the neutral to schedule the proceeding and conduct it prior to the completion deadline set out in the Court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral unless said time limit is changed by a written order of the Court. (Adopted effective October 16, 2001; amended March 4, 2004; amended March 1, 2006.)

Index to Rules of the North Carolina Supreme Court Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases

M

MEDIATORS.

Certified mediator.

Selection by court, Rule 2.B.

Court appointment, Rule 2.B.

S

SCHEDULING CONFERENCE.

Equitable distribution action.

Good cause shown.

Dispensing with requirement to attend,
Rule 1.C.(1).

STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

Adopted June 24, 1999, effective October 1, 1999; Amended effective August 16, 2001; Amended effective March 1, 2006.

Preamble

Rule the confidentiality of all information
obtained within the mediation process.
III. Confidentiality: A mediator shall, subject
to exceptions set forth below, maintain Index follows Rules.

PREAMBLE

These standards are intended to instill and promote public confidence in the mediation process and to be a guide to mediator conduct. As with other forms of dispute resolution, mediation must be built on public understanding and confidence. Persons serving as mediators are responsible to the parties, the public, and the courts to conduct themselves in a manner which will merit that confidence. These standards apply to all mediators participating in mediated settlement conferences in the State of North Carolina pursuant to NCGS 7A-38.1, NCGS 7A-38.3, NCGS 7A-38.4A, NCGS 7A-38.3B, NCGS 7A-38.3C or who are certified by the NC Dispute Resolution Commission. These Standards shall not apply in instances where a mediator is participating in a mediation program or process which is governed by other statutes, program rules, and/or Standards of Conduct and there is a conflict between these Standards and the statutes, rules, or Standards governing the other program. In such instance, the mediator's conduct shall be governed by the conflicting statutory provision, rule, or Standard applicable to the program or process in which the mediator is participating.

Mediation is a process in which an impartial person, a mediator, works with disputing parties to help them explore settlement, reconciliation, and understanding among them. In mediation, the primary responsibility for the resolution of a dispute rests with the parties.

The mediator's role is to facilitate communication and recognition among the parties and to encourage and assist the parties in deciding how and on what terms to resolve the issues in dispute. Among other things, a mediator assists the parties in identifying issues, reducing obstacles to communication, and maximizing the exploration of alternatives. A mediator does not render decisions on the issues in dispute.

Rule III. Confidentiality: A mediator shall, subject to exceptions set forth below, maintain the confidentiality of all information obtained within the mediation process.

A. A mediator shall not disclose, directly or indirectly, to any non-participant, any information communicated to the mediator by a participant within the mediation process.

B. A mediator shall not disclose, directly or indirectly, to any non-participant, information communicated to the mediator in confidence by any participant in the mediation process, unless that participant gives permission to do so. A mediator may encourage a participant to permit disclosure, but absent such permission, the mediator shall not disclose.

C. The confidentiality provisions set forth in A. and B. above notwithstanding, a mediator has discretion to report otherwise confidential conduct or

statements made in preparation for, during, or as a follow-up to mediation to a participant, non-participant, law enforcement personnel, or other officials or to give an affidavit, or to testify about such conduct or statements in the following circumstances:

(1) A statute requires or permits a mediator to testify, to give an affidavit, or to tender a copy of any agreement reached in mediation to the official designated by the statute.

(2) Where public safety is an issue:

(i) a party to the mediation has communicated to the mediator a threat of serious bodily harm or death to be inflicted on any person, and the mediator has reason to believe the party has the intent and ability to act on the threat.

(ii) a party to the mediation has communicated to the mediator a threat of significant damage to real or personal property and the mediator has reason to believe the party has the intent and ability to act on the threat; or

(iii) a party's conduct during the mediation results in direct bodily injury or death to a person.

D. Nothing in this standard prohibits the use of information obtained in a mediation for instructional purposes, or for the purpose of evaluating or monitoring the performance of a mediator, mediation organization, or dispute resolution program, so long as the parties or the specific circumstances of the parties' controversy are not identified or identifiable.

E. Nothing in this Standard shall prohibit a mediator from revealing communications or conduct occurring prior to, during, or after a mediation in the event that a party to or a participant in a mediation has filed a complaint regarding the mediator's professional conduct, moral character, or fitness to practice as a mediator and the mediator reveals the communication or conduct for the purpose of defending him/herself against the complaint. In making any such disclosures, the mediator should make every effort to protect the confidentiality of non-complaining parties to or participants in the mediation and avoid disclosing the specific circumstances of the parties' controversy. The mediator may consult with non-complaining parties or witnesses to consider their input regarding disclosures. (Adopted June 24, 1999, effective October 1, 1999; Amended effective August 16, 2001; Amended effective March 1, 2006.)

Index to Standards of Professional Conduct for Mediators

C

COMPLAINT REGARDING PROFESSIONAL MISCONDUCT, MORAL CHARACTER OR FITNESS.

**Disclosure of communications or conduct
for purposes of defending against
complaint, Prof. Con. Stand. 3.**

NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Article II. Appeals from Judgments and Orders of Superior Courts and District Courts

Rule
3. Appeal in civil cases — How and when taken.

Rule

3A. Appeal in qualifying juvenile cases — How and when taken, special rules.

Index follows Rules.

ARTICLE I. APPLICABILITY OF RULES

Rule 2. Suspension of rules.

CASE NOTES

Consideration of Constitutional Questions Not Properly Raised Below. —

Heinous, atrocious, or cruel aggravating circumstance under G.S. 15A-2000(e)(9) was argued to be unconstitutionally vague and overbroad, and that that vagueness could not be cured through appellate narrowing after Ring; although the issue was not raised in the lower court so as to be properly addressed on appeal, the highest court found the issue to be in the public interest, addressed the issue to further develop its jurisprudence under N.C. R. App. P. 2, and determined that the circumstance was constitutional under the Sixth Amendment because (1) the pattern jury instructions included language approved by the Court that narrowed the definition of the circumstance, and (2) the appellate review of the circumstance as submitted to the jury did not make the appellate court a “co-finder of fact” with the jury. *State v. Duke*, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

Residual Power to Consider Important Issues. —

Where defendant’s appellate brief, challenging defendant’s first-degree murder conviction, did not cite the specific assignment of error that defendant contended supported defendant’s one argument that was not waived and defendant did not attach to the brief the pertinent portions of the trial proceedings related to the argument, defendant violated N.C. R. App. P. 28(b)(6), (d)(1); however, the appellate court, rather than deeming the error waived, exercised its discretion under N.C. R. App. P. 2 to examine the merits of defendant’s argument. *State v. Champion*, — N.C. App. —, 615 S.E.2d 366, 2005 N.C. App. LEXIS 1364 (2005).

Even though defendant failed to object or raise as plain error the jury instructions given in a case relating to damage to computers, appellate court could review the case under N.C. App. Proc., Rule 2 because there was limited case law and no jury instructions on the

crime. *State v. Johnston*, — N.C. App. —, 618 S.E.2d 807, 2005 N.C. App. LEXIS 2034 (2005).

Power to Resolve Case in the Interests of Justice. —

Despite the fact that defendant did not object to the admission of his uncorroborated statements at trial, the appellate court reviewed his appeal of the issue because he relied on G.S. 8C-1, N.C. R. Evid. 103(a)(2), which only preserved the issue after defendant filed his motion in limine, during trial and it would have been a manifest injustice no to do so. *State v. Highsmith*, — N.C. App. —, 619 S.E.2d 586, 2005 N.C. App. LEXIS 2123 (2005).

Provisions of N.C. R. App. P. 2 are discretionary, and cannot be used to confer jurisdiction upon an appellate court in the absence of jurisdiction. *Carolinas Med. Ctr. v. Emplrs & Carriers Listed in Exhibit A*, — N.C. App. —, 616 S.E.2d 588, 2005 N.C. App. LEXIS 1773 (2005).

When the North Carolina Industrial Commission exceeded its authority by finding a prior version of G.S. 97-26(b) unconstitutional, the question of the statute’s constitutionality was not properly presented to an appellate court on appeal of the Commission’s decision because, among other reasons, no party filed a certiorari petition, pursuant to N.C. R. App. P. 21, nor did a party seek suspension of the Rules of Appellate Procedure, under N.C. R. App. P. 2, nor did the Commission certify the question to the appellate court, under G.S. 97-86. *Carolinas Med. Ctr. v. Emplrs & Carriers Listed in Exhibit A*, — N.C. App. —, 616 S.E.2d 588, 2005 N.C. App. LEXIS 1773 (2005).

Despite the fact that defendant did not object to the admission of his uncorroborated statements at trial, the appellate court reviewed his appeal of the issue because he relied on G.S. 8C-1, N.C. R. Evid. 103(a)(2), which only preserved the issue after defendant filed his motion in limine, during trial and it would have been a manifest injustice no to do so. *State v. Highsmith*, — N.C. App. —, 619 S.E.2d 586,

2005 N.C. App. LEXIS 2123 (2005).

Even though the issue was not properly preserved for appellate review, a sentence for first degree kidnapping was remanded because the dual use of rapes to elevate a second degree kidnapping to first degree kidnapping was prohibited; therefore, the use of the court's inherent authority was necessary to prevent a manifest injustice. *State v. Moore*, — N.C. App. —, 620 S.E.2d 1, 2005 N.C. App. LEXIS 2103 (2005).

Review of Significant Issues Warranted.

— Since a plaintiff's violations of N.C. R. App. P. 26(g), 28(b)(5)-(6), (d)(1)c., and 41(b)(2) were not so egregious as to invoke dismissal, the appeals court elected to review the significant issues of the employee's appeal of a summary judgment dismissing her wrongful termination/discrimination claims pursuant to N.C. R. App. P. 2. *Youse v. Duke Energy Corp.*, 171 N.C. App. 187, 614 S.E.2d 396, 2005 N.C. App. LEXIS 1209 (2005).

Review in Spite of Failure to Comply With N.C. R. App. P. 10(c)(1) — While defendants failed to specify any enumerated findings of fact or conclusions of law, as required by N.C. R. App. P. 10(c)(1) but did refer to the page of the record where the disputed finding of fact was located, the court chose to review the assignments of error given the provision in N.C. R. App. P. 2 allowing the court to review an appeal despite rules violations. *Davis v. Columbus County Schs.*, — N.C. App. —, 622 S.E.2d 671, 2005 N.C. App. LEXIS 2709 (2005).

Discretion of Appellate Court. —

Where the trial court did not certify the order, which denied the construction company's motion to dismiss an action brought by a homeowners association for lack of standing, as immediately appealable pursuant to G. S. 1A-1, Rule 54, and the construction company did not appear to be deprived of any substantial right which could not be protected by timely appeal from the ultimate disposition of the controversy on its merits, the appellate court held there was no reason to invoke N.C. R. App. P. 2. *Pineville Forest Homeowners Ass'n v. Portrait Homes Constr. Co.*, — N.C. App. —, 623 S.E.2d 620, 2006 N.C. App. LEXIS 71 (2006).

Defendant's failure to comply with N.C. R. App. P. 10(b) by failing to renew his motion to dismiss at the close of all evidence caused his appeal to be dismissed since the defendant's failure to comply with N.C. R. App. P. 10 did not create a manifest injustice justifying the appellate court to invoke its review under N.C. R. App. P. 2 since no manifest injustice was created. *State v. Buchanan*, 170 N.C. App. 692, 613 S.E.2d 356, 2005 N.C. App. LEXIS 1071 (2005).

Lack of Jurisdiction. —

Appellate court lacked jurisdiction to hear defendant's appeal where defendant failed to give timely notice of appeal, and defendant's

brief did not meet requirements of a petition for a writ of certiorari as set forth in N.C. R. App. P. 21(c); the appellate court declined to exercise its discretion under N.C. R. App. P. 2 to correct the defects in defendant's purported petition for writ of certiorari, and additionally, declined to exercise its discretion and denied defendant's purported petition for writ of certiorari. *State v. McCoy*, — N.C. App. —, 615 S.E.2d 319, 2005 N.C. App. LEXIS 1319 (2005).

Denial of Request to Review Admission of Prior Orders. — Appellate court refused to review the admission during a termination of parental rights proceeding of the orders entered in a neglect and dependency proceeding under N.C. R. App. P. 2 as the mother never appealed the orders, despite being represented by counsel, and did not contest the admission of the orders in the termination of parental rights proceeding as required by N.C. R. App. P. 10. *In re E.T.S.*, — N.C. App. —, 623 S.E.2d 300, 2005 N.C. App. LEXIS 2724 (2005).

Appellants' appeal was dismissed, etc.

Purported assignment of error that simply stated that the appellant assigned "as error the following entry: Entry of the Order for Modification of alimony filed October 7, 2004," with no record references and no statement of legal basis for the assignment of error, did not comply with N.C. App. Proc., Rule 10; suspending the rules pursuant to N.C. App. Proc., Rule 2 would have involved the court in creating the appeal, and would not have been fair to the appellee. *Broderick v. Broderick*, — N.C. App. —, 623 S.E.2d 806, 2006 N.C. App. LEXIS 188 (2006).

Applied in *State v. Brown*, 170 N.C. App. 601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069 (2005), cert. denied, 360 N.C. 68, 621 S.E.2d 882 (2005); *State v. Oglesby*, — N.C. App. —, 622 S.E.2d 152, 2005 N.C. App. LEXIS 2624 (2005); *Brown v. City of Winston-Salem*, 171 N.C. App. 266, 614 S.E.2d 599, 2005 N.C. App. LEXIS 1266 (2005); *In re Pedestrian Walkway Failure*, — N.C. App. —, 618 S.E.2d 796, 2005 N.C. App. LEXIS 2022 (2005); *State v. Watts*, — N.C. App. —, 616 S.E.2d 290, 2005 N.C. App. LEXIS 1588 (2005); *In re J.B.*, — N.C. App. —, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005).

Cited in *State v. Hames*, 170 N.C. App. 312, 612 S.E.2d 408, 2005 N.C. App. LEXIS 1007 (2005), cert. denied, stay denied, 360 N.C. 70, 622 S.E.2d 496 (2005); *Viar v. N.C. DOT*, 359 N.C. 400, 610 S.E.2d 360, 2005 N.C. LEXIS 360 (2005); *State v. Langley*, — N.C. App. —, 618 S.E.2d 253, 2005 N.C. App. LEXIS 1920 (2005); *State v. Tuck*, — N.C. App. —, 618 S.E.2d 265, 2005 N.C. App. LEXIS 1930 (2005); *State v. McKinney*, — N.C. App. —, 619 S.E.2d 901, 2005 N.C. App. LEXIS 2307 (2005).

ARTICLE II. APPEALS FROM JUDGMENTS AND ORDERS OF SUPERIOR COURTS AND DISTRICT COURTS

Rule 3. Appeal in civil cases — How and when taken.

(a) *Filing the notice of appeal.* Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.

(b) *Special provisions.* Appeals in the following types of cases shall be taken in the time and manner set out in the General Statutes and appellate rules sections noted:

(1) Juvenile matters, G.S. 7B-2602.

(2) Appeals pursuant to G.S. 7B-1001 shall be subject to the provisions of N.C.R. App. P. 3A.

For appeals filed pursuant to these provisions and for extraordinary writs filed in cases to which these provisions apply, the name of the juvenile who is the subject of the action, and of any siblings or other household members under the age of eighteen, shall be referenced by the use of initials only in all filings, documents, exhibits, or arguments submitted to the appellate court with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). In addition, the juvenile's address, social security number, and date of birth shall be excluded from all filings, documents, exhibits, or arguments with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). Appeals filed pursuant to these provisions shall specifically comply, if applicable, with Rules 9(b), 9(c), 26(g), 28(d), 28(k), 30, 37, 41 and Appendix B.

(c) *Time for taking appeal.* In civil actions and special proceedings, a party must file and serve a notice of appeal:

(1) within 30 days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure; or

(2) within 30 days after service upon the party of a copy of the judgment if service was not made within that three-day period; provided that

(3) if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the 30-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order or its untimely service upon the party, as provided in subsections (1) and (2) of this subdivision (c).

In computing the time for filing a notice of appeal, the provision for additional time after service by mail of N.C.R. App. 27(b) and N.C.R. Civ. P. 6(e) shall not apply.

If timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party.

(d) *Content of notice of appeal.* The notice of appeal required to be filed and served by subdivision (a) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(e) *Service of notice of appeal.* Service of copies of the notice of appeal may be made as provided in Rule 26 of these rules. (Adopted June 13, 1975; Amended April 14, 1976; Amended December 8, 1988 — 3(a), (b), (c), (d) —

effective for all judgments of the trial tribunal entered on or after July 1, 1989; Amended June 8, 1989 — 3(b) — effective for all judgments of the trial tribunal entered on or after July 1, 1989; Amended July 28, 1994 — 3(c) — effective October 1, 1994; Amended March 6, 1997 — 3(c) — effective upon adoption March 6, 1997; Amended October 18, 2001 — 3(c) — effective October 31, 2001; Amended May 1, 2003 — 3(b); Amended May 6, 2004 — 3(b) — effective May 12, 2004; Amended February 28, 2006 — 3(b) — effective May 1, 2006.)

CASE NOTES

I. In General.

I. IN GENERAL.

Notice of Appeal Insufficient. —

When, in a dependency proceeding, a trial court orally granted foster parents' oral motion to intervene, a department of social services could not appeal the granting of that oral motion because: (1) its notice of appeal did not reference the intervention order, as required by N.C. App. R. 3(d); and (2) once the trial court

entered a written order indicating its grant of the foster parents' request, after the department had filed its notice of appeal, the department did not file another notice of appeal regarding the written order. *In re L.L.*, — N.C. App. —, 616 S.E.2d 392, 2005 N.C. App. LEXIS 1798 (2005).

Applied in *Dixon v. Hill*, — N.C. App. —, 620 S.E.2d 715, 2005 N.C. App. LEXIS 2393 (2005).

Rule 3A. Appeal in qualifying juvenile cases — How and when taken, special rules.

(a) *Filing the notice of appeal.* Any party entitled by law to appeal from a trial court judgment or order rendered in a case involving termination of parental rights and issues of juvenile dependency or juvenile abuse and/or neglect, appealable pursuant to G.S. 7B-1001, may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties in the time and manner set out in Chapter 7B of the General Statutes of North Carolina. Trial counsel or an appellant not represented by counsel shall be responsible for filing and serving the notice of appeal in the time and manner required. If the appellant is represented by counsel, both the trial counsel and appellant must sign the notice of appeal, and the appellant shall cooperate with counsel throughout the appeal. All such appeals shall comply with the special provisions set out in subsection (b) of this rule and, except as hereinafter provided by this rule, all other existing Rules of Appellate Procedure shall remain applicable.

(b) *Special provisions.* For appeals filed pursuant to this rule and for extraordinary writs filed in cases to which these provisions apply, the name of the juvenile who is the subject of the action, and of any siblings or other household members under the age of eighteen, shall be referenced only by the use of initials in all filings, documents, exhibits, or arguments submitted to the appellate court with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). In addition, the juvenile's address, social security number, and date of birth shall be excluded from all filings, documents, exhibits, or arguments with the exception of sealed verbatim transcripts submitted pursuant to subdivision (b)(1) below or Rule 9(c).

In addition, appeals filed pursuant to these provisions shall adhere strictly to the expedited procedures set forth below:

(1) *Transcripts.* Within one business day after the notice of appeal has been filed, the clerk of superior court shall notify the court reporting coordinator of the Administrative Office of the Courts of the date the notice of appeal was filed and the names of the parties to the appeal and their respective addresses or addresses of their counsel. Within two business days of receipt of such notification, the court reporting coordinator shall assign a transcriptionist to

the case. Within thirty-five days from the date of the assignment, the transcriptionist shall prepare and deliver a transcript of the designated proceedings to the office of the Clerk of the Court of Appeals and provide copies to the respective parties to the appeal at the addresses provided. Motions for extensions of time to prepare and deliver transcripts are disfavored and will not be allowed by the Court of Appeals absent extraordinary circumstances.

(2) *Record on Appeal*. Within ten days after receipt of the transcript, the appellant shall prepare and serve upon all other parties a proposed record on appeal constituted in accordance with Rule 9. Trial counsel for the appealing party shall have a duty to assist appellate counsel if separate counsel is appointed or retained for the appeal, in preparing and serving a proposed record on appeal. Within ten days after service of the proposed record on appeal upon an appellee, the appellee may serve upon all other parties: (1) a notice of approval of the proposed record; (2) specific objections or amendments to the proposed record on appeal, or (3) a proposed alternative record on appeal.

If the parties agree to a settled record on appeal within twenty days after receipt of the transcript, the appellant shall file three legible copies of the settled record on appeal in the office of the Clerk of the Court of Appeals within five business days from the date the record was settled. If all appellees fail within the times allowed them either to serve notices of approval or to serve objections, amendments, or proposed alternative records on appeal, the appellant's proposed record on appeal shall constitute the settled record on appeal, and the appellant shall file three legible copies thereof in the office of the Clerk of the Court of Appeals within five business days from the last date upon which any appellee could have served such objections, amendments, or proposed alternative record on appeal. If an appellee timely serves amendments, objections, or a proposed alternative record on appeal and the parties cannot agree to the settled record within thirty days after notice of appeal has been filed, each party shall file three legible copies of the following documents in the office of the Clerk of the Court of Appeals within five business days after the last day upon which the record can be settled by agreement: (1) the appellant shall file his or her proposed record on appeal, and (2) an appellee shall file his or her objections, amendments, or proposed alternative record on appeal.

No counsel who has appeared as trial counsel for any party in the proceeding shall be permitted to withdraw, nor shall such counsel be otherwise relieved of any responsibilities imposed pursuant to this rule, until the record on appeal has been filed in the office of the Clerk of the Court of Appeals as provided herein.

(3) *Briefs*. Within thirty days after the record on appeal has been filed with the Court of Appeals, the appellant shall file his or her brief in the office of the Clerk of the Court of Appeals and serve copies upon all other parties of record. Within thirty days after the appellant's brief has been served on an appellee, the appellee shall file his or her brief in the office of the Clerk of the Court of Appeals and serve copies upon all other parties of record. Motions for extensions of time to file briefs will not be allowed absent extraordinary circumstances.

(c) *Calendaring priority*. Appeals filed pursuant to this rule will be given priority over other cases being considered by the Court of Appeals and will be calendared in accordance with a schedule promulgated by the Chief Judge. Unless otherwise ordered by the Court of Appeals, cases subject to the expedited procedures set forth in this rule shall be disposed of on the record and briefs and without oral argument. (Added February 28, 2006 — effective May 1, 2006.)

Rule 4. Appeal in criminal cases — How and when taken.**CASE NOTES****I. In General.****I. IN GENERAL.**

Jurisdiction. — Appellate court lacked jurisdiction to hear defendant's appeal where defendant failed to give timely notice of appeal, and defendant's brief did not meet requirements of a petition for a writ of certiorari as set forth in N.C. R. App. P. 21(c); the appellate court declined to exercise its discretion under

N.C. R. App. P. 2 to correct the defects in defendant's purported petition for writ of certiorari, and additionally, declined to exercise its discretion and denied defendant's purported petition for writ of certiorari. *State v. McCoy*, — N.C. App. —, 615 S.E.2d 319, 2005 N.C. App. LEXIS 1319 (2005).

Rule 7. Preparation of the transcript; Court reporter's duties.**CASE NOTES****Submission of Transcript to Court of Appeals. —**

Mother's failure to submit a factual record under N.C. R. App. P.7(a)(1) meant the appellate court had no basis for reversing findings that the mother's adulterous relationship with a man to whom she then married placed undue stress on the children and was the primary cause of the older child's emotional problems; nor was there abuse of the trial court's discretion to base custody decisions on its own training and experience in custody matters. *Faulkenberry v. Faulkenberry*, 169 N.C. App. 428, 610 S.E.2d 237, 2005 N.C. App. LEXIS 688 (2005).

Failure to deliver a copy of the transcript to defendant until six years after he made his first request did not deny defen-

dant his right to meaningful and effective appellate review since the delay was in part due to defendant's failure to assert his right to a speedy trial or seek a court order compelling production of the transcript. *State v. Berryman*, 170 N.C. App. 336, 612 S.E.2d 672, 2005 N.C. App. LEXIS 1004 (2005), *aff'd*, — N.C. —, 624 S.E.2d 350 (2006).

Burden of Proof on Defendant. — Defendant, who was appealing from a criminal conviction, bore the burden of proceeding and of ensuring that the record on appeal and verbatim transcript were complete, properly settled, in correct form, and filed with the appropriate appellate court by the applicable deadlines. *State v. Berryman*, 360 N.C. 209, 624 S.E.2d 350, 2006 N.C. LEXIS 8 (2006).

Rule 9. The record on appeal.**CASE NOTES****I. In General.****I. IN GENERAL.**

The defendant appellant has the duty to see that the record on appeal is properly made up, etc.

Defendant, who was appealing from a criminal conviction, bore the burden of proceeding and of ensuring that the record on appeal and verbatim transcript were complete, properly settled, in correct form, and filed with the appropriate appellate court by the applicable deadlines. *State v. Berryman*, 360 N.C. 209, 624 S.E.2d 350, 2006 N.C. LEXIS 8 (2006).

Record in Improper Form. —

As a necessary predicate to an evaluation of an order confirming an arbitration award, the record on appeal was required to reflect what

evidence was presented to the arbitration panel; appellate court was unable to evaluate whether the arbitration panel "manifestly disregarded the law" and whether the trial court, in turn, erred by failing to conclude the same, where the appellate court was not provided a transcript of the arbitration hearing, a narrative of the proceedings, a listing of the witnesses proffered by the parties and a summary of their testimonies, or an identification of the exhibits actually presented to the arbitration panel. *Global Circuits of N.C., Inc. v. Chandak*, — N.C. App. —, 622 S.E.2d 643, 2005 N.C. App. LEXIS 2593 (2005).

Omission of Necessary Part of Record. —

Ex-wife's claim that trial court had found

that husband failed to notify her of an offer to purchase a parcel of real property, and that the husband was collaterally estopped from relitigating the same issue, was not addressed because the ex-wife failed to include a copy of the trial court's order in the record on appeal. *County of Jackson v. Nichols*, — N.C. App. —, 623 S.E.2d 277, 2005 N.C. App. LEXIS 2749 (2005).

Applied in *State v. Berryman*, 170 N.C. App.

336, 612 S.E.2d 672, 2005 N.C. App. LEXIS 1004 (2005), *aff'd*, — N.C. —, 624 S.E.2d 350 (2006); *Boyd v. Robeson County*, 169 N.C. App. 460, 621 S.E.2d 1, 2005 N.C. App. LEXIS 2352 (2005).

Cited in *State v. McMahan*, — N.C. App. —, 621 S.E.2d 319, 2005 N.C. App. LEXIS 2477 (2005); *In re L.O.K.*, — N.C. App. —, 621 S.E.2d 236, 2005 N.C. App. LEXIS 2476 (2005).

Rule 10. Assigning error on appeal.

CASE NOTES

- I. In General.
- II. Limiting Scope of Review.
 - A. Generally.
 - B. Issues Not Requiring Objection or Motion.
- III. Preserving Questions for Appeal.
 - A. Generally.
 - B. Jury Instructions; Findings and Conclusions of Judge.
 - C. Sufficiency of Evidence.
- IV. Assignments of Error.
 - A. Form; Record References.
 - B. Jury Instructions.
 - D. Plain Error.
- V. Cross-Assignments by Appellee.

I. IN GENERAL.

Construction with G.S. 8C-1-103(a)(2). — Constitution of North Carolina vests the Supreme Court of North Carolina with exclusive authority to make rules of practice and procedure for the appellate division of the courts; while G.S. 8C-1-103(a)(2) permitted appellate review of an evidentiary ruling even though the party failed to object at trial, since G.S. 8C-1-103(a)(2) was inconsistent with N.C. R. App. P. 10(b)(1), G.S. 8C-1-103(a)(2) failed. *State v. Tutt*, — N.C. App. —, 615 S.E.2d 688, 2005 N.C. App. LEXIS 1313 (2005).

Applied in *Taylor v. Carolina Rest. Group, Inc.*, 170 N.C. App. 532, 613 S.E.2d 510, 2005 N.C. App. LEXIS 1079 (2005), *aff'd*, 360 N.C. 173, 622 S.E.2d 492 (2005); *State v. Howell*, 169 N.C. App. 741, 611 S.E.2d 200, 2005 N.C. App. LEXIS 795 (2005), *cert. denied*, — N.C. —, 622 S.E.2d 500 (2005), *cert. denied*, 360 N.C. 71, 622 S.E.2d 500 (2005); *State v. McClain*, 169 N.C. App. 657, 610 S.E.2d 783, 2005 N.C. App. LEXIS 804 (2005); *State v. Ledwell*, 171 N.C. App. 314, 614 S.E.2d 562, 2005 N.C. App. LEXIS 1212 (2005); *Eley v. Mid/East Acceptance Corp. of N.C., Inc.*, 171 N.C. App. 368, 614 S.E.2d 555, 2005 N.C. App. LEXIS 1253 (2005); *State v. Belton*, 169 N.C. App. 350, 610 S.E.2d 283, 2005 N.C. App. LEXIS 618 (2005); *In re P.M.*, 169 N.C. App. 423, 610 S.E.2d 403, 2005 N.C. App. LEXIS 678 (2005); *Scoggins v. Jacobs*, 169 N.C. App. 411, 610 S.E.2d 428, 2005

N.C. App. LEXIS 684 (2005); *State v. Buff*, 170 N.C. App. 374, 612 S.E.2d 366, 2005 N.C. App. LEXIS 998 (2005); *State v. Oglesby*, — N.C. App. —, 622 S.E.2d 152, 2005 N.C. App. LEXIS 2624 (2005); *Welch Contr., Inc. v. N.C. DOT*, — N.C. App. —, 622 S.E.2d 691, 2005 N.C. App. LEXIS 2725 (2005); *Alexander v. Cumberland County Bd. of Educ.*, — N.C. App. —, 615 S.E.2d 408, 2005 N.C. App. LEXIS 1366 (2005); *Beachcrete, Inc. v. Water St. Ctr. Assocs., L.L.C.*, — N.C. App. —, 615 S.E.2d 719, 2005 N.C. App. LEXIS 1575 (2005); *State v. Locklear*, — N.C. App. —, 616 S.E.2d 334, 2005 N.C. App. LEXIS 1583 (2005); *State v. Campbell*, 359 N.C. 644, 617 S.E.2d 1, 2005 N.C. LEXIS 842 (2005); *Dixon v. Hill*, — N.C. App. —, 620 S.E.2d 715, 2005 N.C. App. LEXIS 2393 (2005); *State v. Watts*, — N.C. App. —, 616 S.E.2d 290, 2005 N.C. App. LEXIS 1588 (2005); *In re J.B.*, — N.C. App. —, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005); *State v. Bellamy*, — N.C. App. —, 617 S.E.2d 81, 2005 N.C. App. LEXIS 1793 (2005); *State v. Stokes*, — N.C. App. —, 621 S.E.2d 311, 2005 N.C. App. LEXIS 2495 (2005); *State v. Cummings*, — N.C. App. —, 622 S.E.2d 183, 2005 N.C. App. LEXIS 2618 (2005); *Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp.*, — N.C. App. —, 624 S.E.2d 380, 2006 N.C. App. LEXIS 128 (2006).

Cited in *Schenk v. HNA Holdings, Inc.*, 170 N.C. App. 555, 613 S.E.2d 503, 2005 N.C. App. LEXIS 1067 (2005); *In re Z.T.B.*, 170 N.C. App. 564, 613 S.E.2d 298, 2005 N.C. App. LEXIS

1093 (2005); *State v. Nicholson*, 169 N.C. App. 390, 610 S.E.2d 433, 2005 N.C. App. LEXIS 601 (2005); *Moose v. Versailles Condo. Ass'n*, 171 N.C. App. 377, 614 S.E.2d 418, 2005 N.C. App. LEXIS 1199 (2005); *State v. Fisher*, 171 N.C. App. 201, 614 S.E.2d 428, 2005 N.C. App. LEXIS 1214 (2005); *State v. Andrews*, 170 N.C. App. 68, 612 S.E.2d 178, 2005 N.C. App. LEXIS 891 (2005); *State v. Shearin*, 170 N.C. App. 222, 612 S.E.2d 371, 2005 N.C. App. LEXIS 1002 (2005), appeal dismissed, cert. denied, — N.C. —, 624 S.E.2d 369 (2005); *State v. Hames*, 170 N.C. App. 312, 612 S.E.2d 408, 2005 N.C. App. LEXIS 1007 (2005), cert. denied, stay denied, 360 N.C. 70, 622 S.E.2d 496 (2005); *Bursell v. N.C. Indus. Comm'n I.C. No. 177846*, — N.C. App. —, 616 S.E.2d 342, 2005 N.C. App. LEXIS 1427 (2005); *State v. Tuck*, — N.C. App. —, 618 S.E.2d 265, 2005 N.C. App. LEXIS 1930 (2005); *In re As.L.G.*, — N.C. App. —, 619 S.E.2d 561, 2005 N.C. App. LEXIS 2116 (2005); *State v. Highsmith*, — N.C. App. —, 619 S.E.2d 586, 2005 N.C. App. LEXIS 2123 (2005); *State v. Baublitz*, — N.C. App. —, 616 S.E.2d 615, 2005 N.C. App. LEXIS 1778 (2005); *In re As.L.G.*, — N.C. App. —, 619 S.E.2d 561, 2005 N.C. App. LEXIS 2116 (2005); *State v. Highsmith*, — N.C. App. —, 619 S.E.2d 586, 2005 N.C. App. LEXIS 2123 (2005); *State v. McKinney*, — N.C. App. —, 619 S.E.2d 901, 2005 N.C. App. LEXIS 2307 (2005); *State v. Garcia*, — N.C. App. —, 621 S.E.2d 292, 2005 N.C. App. LEXIS 2493 (2005); *Atl. Coast Mech., Inc. v. Arcadis, Geraghty & Miller of N.C., Inc.*, — N.C. App. —, 623 S.E.2d 334, 2006 N.C. App. LEXIS 58 (2006); *State v. Matthews*, — N.C. App. —, 623 S.E.2d 815, 2006 N.C. App. LEXIS 138 (2006); *State v. Andrews*, 170 N.C. App. 68, 612 S.E.2d 178, 2005 N.C. App. LEXIS 891 (2005).

II. LIMITING SCOPE OF REVIEW.

A. Generally.

Question Must Be Presented on Appeal.

Plaintiff's appeal was dismissed where repeated assertions that the trial court's rulings were "contrary to the case law of this jurisdiction" failed to identify the issues briefed on appeal, and were too "broad, vague, and unspecific" to comport with the North Carolina Rules of Appellate Procedure. *May v. Down E. Homes of Beulaville, Inc.*, — N.C. App. —, 623 S.E.2d 345, 2006 N.C. App. LEXIS 51 (2006).

Plain Error Review Not Applicable. — Contention that the trial court erred by failing to declare a mistrial was not reviewable for plain error because plain error review does not apply to decisions made at the trial judge's discretion. *State v. Verrier*, — N.C. App. —, 617 S.E.2d 675, 2005 N.C. App. LEXIS 1899 (2005).

Defendant's failure to renew his motion

to dismiss at the close of all evidence caused his appeal to be dismissed, since the defendant's failure to comply with N.C. R. App. P. 10 did not create a manifest injustice justifying the appellate court to invoke its review under N.C. R. App. P. 2 since no manifest injustice was created. *State v. Buchanan*, 170 N.C. App. 692, 613 S.E.2d 356, 2005 N.C. App. LEXIS 1071 (2005).

B. Issues Not Requiring Objection or Motion.

Questions of Law. — When neither party assigns error to a trial court's findings of fact, appellate review is limited to an appellant's contention that the trial court's findings of fact do not support its conclusion of law, under N.C. R. App. P.10(a). *In re Estate of Lunsford*, 359 N.C. 382, 610 S.E.2d 366, 2005 N.C. LEXIS 358 (2005).

Award of Legal Guardianship and Visitation. — Mother's appeal of trial court's award of legal guardianship of child and award of visitation to the mother was reviewable because the mother's failure to object at the dispositional hearing was not a failure to preserve the issues for appeal; nor was the mother required to object at the hearing or raise a motion in order to preserve this type of question for appellate review. *In re E.C.*, — N.C. App. —, 621 S.E.2d 647, 2005 N.C. App. LEXIS 2494 (2005).

III. PRESERVING QUESTIONS FOR APPEAL.

A. Generally.

Failure to Raise Issue in Trial Court. —

Defendant failed to preserve his challenge to a juror for review where he failed to object to her continued service after she disclosed, during trial, that she knew one of the State's witnesses. *State v. Bates*, — N.C. App. —, 616 S.E.2d 280, 2005 N.C. App. LEXIS 1585 (2005).

Appellate court refused to review the admission during a termination of parental rights proceeding of the orders entered in a neglect and dependency proceeding under N.C. R. App. P. 2 as the mother never appealed the orders, despite being represented by counsel, and did not contest the admission of the orders in the termination of parental rights proceeding as required by N.C. R. App. P. 10. *In re E.T.S.*, — N.C. App. —, 623 S.E.2d 300, 2005 N.C. App. LEXIS 2724 (2005).

Order allowing estates to amend their complaint in a medical malpractice suit was not immediately appealable where the issues of a hospital's claim that, without immediate review, it lost the right to avoid trial altogether by (1) raising the statute of limitations, (2) raising "estoppel by laches" as an affirmative defense, or (3) having the amended complaint dismissed

for failure to comply with G.S. 1A-1, N.C. R. Civ. P. 9(j), were not brought before the trial court, and no substantial right was lost by the failure to allow immediate review; the estates were also entitled to sanctions against the hospital. *Estate of Spell v. Ghanem*, — N.C. App. —, 622 S.E.2d 725, 2005 N.C. App. LEXIS 2717 (2005).

Defendant could not claim on appeal that references by two witnesses concerning his time in jail violated his right to a fair trial, as defendant did not raise an objection to such testimony in the trial court; thus, there was nothing for the appellate court to review. *State v. Medina*, — N.C. App. —, 622 S.E.2d 176, 2005 N.C. App. LEXIS 2608 (2005).

Failure to Except Precludes Review. —

Since the record did not indicate that the lessees objected on the basis that the lessor was required to amend its complaint, and thus should have been limited to the \$14,170 of damages requested in the complaint, before entry of the partial summary judgment order, and the only mention of the argument by the lessees occurred after the jury entered its verdict, the lessees failed to preserve the issue for appellate review. *Sylva Shops, Ltd. P'ship v. Hibbard*, — N.C. App. —, 623 S.E.2d 785, 2006 N.C. App. LEXIS 181 (2006).

Failure to Assign Error. — Where employer failed to assign error to the commission's opinion and award on the basis that the commission erroneously failed to give a credit for temporary total disability benefits paid past the date the employee reached maximum medical improvement, that argument was not properly preserved for appellate review. *Lewis v. Craven Reg'l Med. Ctr.*, — N.C. App. —, 621 S.E.2d 259, 2005 N.C. App. LEXIS 2473 (2005).

Defendant's failure to support his contention that the trial court committed plain error by allowing a witness to describe what she saw on a computer precluded appellate review of that assignment of error. *State v. Verrier*, — N.C. App. —, 617 S.E.2d 675, 2005 N.C. App. LEXIS 1899 (2005).

When, in a dependency proceeding, a department of social services did not object to the judge who had previously heard the case conducting a hearing in the case, even though, that day, she was assigned to hear cases in the civil district court rather than the juvenile court, it could not raise, on appeal, the question of whether the judge improperly retained jurisdiction over the case, because it did not raise the issue before the trial court, as required by N.C. R. App. P. 10(b)(1). *In re L.L.*, — N.C. App. —, 616 S.E.2d 392, 2005 N.C. App. LEXIS 1798 (2005).

When, in a dependency proceeding, a trial court orally granted foster parents' oral request to intervene, if a father's assignment of error to a finding of fact which addressed the foster

parents' intervention was sufficient, for purposes of a notice of appeal, review was still precluded under N.C. R. App. P. 10(b)(1), because no one objected to the request to intervene, so the question was not presented to the trial court and preserved for review. *In re L.L.*, — N.C. App. —, 616 S.E.2d 392, 2005 N.C. App. LEXIS 1798 (2005).

Failure to Object to Imposition of Costs and Pre-Judgment Interest. — In a wrongful death action based on the medical specialist's malpractice, the trial court did not err in requiring the specialist to pay all pre-judgment interest and costs because the medical specialist failed to make any objection on the record as to the imposition of costs and pre-judgment interest or the apportionment thereof as required by G. S. 1A-1, Rule 10(b)(1). *Boykin v. Kim*, — N.C. App. —, 620 S.E.2d 707, 2005 N.C. App. LEXIS 2396 (2005).

Continuing Objection Preserved All Issues Regarding Hearsay. — Defendant's pattern of objections to hearsay testimony constituted a continuing objection to the line of questioning and therefore all of the hearsay testimony could be considered on appeal, even though only part of the testimony was objected to at trial. *State v. Lawson*, — N.C. App. —, 619 S.E.2d 410, 2005 N.C. App. LEXIS 2036 (2005).

Failure To Object to Aggravated Sentence. — Defendant's failure to object to the trial court's imposition of an aggravated sentence did not bar defendant from arguing the sentence on appeal. *State v. Harris*, — N.C. App. —, 623 S.E.2d 588, 2006 N.C. App. LEXIS 57 (2006).

Sentencing Issue Did Not Have to Be Preserved. — N.C. R. App. P. 10(b) did not preclude defendant from raising the issue of an order that he have no contact with the victims on appeal, because an error at sentencing is not considered an error at trial for the purpose of the rule because the rule was directed to matters which occurred at trial and upon which the trial court had to be given an opportunity to rule in order to preserve the question for appeal. *State v. Curmon*, — N.C. App. —, 615 S.E.2d 417, 2005 N.C. App. LEXIS 1362 (2005).

Issue Not Preserved. —

Because an appellant's assignments of error: (1) were extremely broadsided, (2) were not followed by citations to the record or transcript, and (3) failed to specify which findings were being challenged, the appellate court was unable to determine which findings of fact the appellant specifically contended were misapplications of the whole record test. *N.C. Dep't of Crime Control & Pub. Safety v. Greene*, — N.C. App. —, 616 S.E.2d 594, 2005 N.C. App. LEXIS 1805 (2005).

On an appeal of a dependency finding, the father's arguments regarding changes to and reliability of a doctor's opinion were not prop-

erly before the appellate court because the father: (1) failed to object to the doctor's testimony during the hearing; and (2) failed to specifically assign error to that testimony or the trial court's reliance on that testimony. *In re A.E.*, — N.C. App. —, 615 S.E.2d 53, 2005 N.C. App. LEXIS 1368 (2005).

Appellate court would not address the claimant's assertion that the trial court erred in awarding costs to the opposing parties, as that assertion was not set forth in the claimant's assignment of errors. *Duncan v. Cuna Mut. Ins. Soc'y*, 171 N.C. App. 403, 614 S.E.2d 592, 2005 N.C. App. LEXIS 1207 (2005).

Mother failed to properly preserve for appellate review the issue of whether the trial court erroneously allowed the guardians to participate in the juvenile dependency proceedings without filing a motion to intervene, because the mother failed to object to the guardians' participation in the proceedings at the trial level. *In re L.M.C.*, 170 N.C. App. 676, 613 S.E.2d 256, 2005 N.C. App. LEXIS 1089 (2005).

Illustrative Cases. —

Defendant was not required by N.C. R. App. P. 10(b)(1) to object during sentencing in order to properly preserve a claim of an error as to whether the trial court erroneously considered evidence from his co-defendant's trial for appellate review; Rule 10(b)(1) concerned matters that occurred at trial and upon which the trial court had to be given an opportunity to rule in order to preserve the question for appeal. *State v. Pender*, — N.C. App. —, 622 S.E.2d 664, 2005 N.C. App. LEXIS 2710 (2005).

B. Jury Instructions; Findings and Conclusions of Judge.

Objections Required by Subdivision (b)(2). —

Where driver failed to object to the trial court's instruction, which was substantially the same as the North Carolina Pattern Jury Instruction for peculiar susceptibility, the issue was therefore not properly preserved for appellate review. *Oakes v. Wooten*, — N.C. App. —, 620 S.E.2d 39, 2005 N.C. App. LEXIS 2100 (2005).

Failure to Except to Jury Instructions. —

Where defendant did not object to the jury instructions at trial and argued on appeal that the 2.9 grams of methamphetamine found in her home was for personal use, and her trial strategy was to have the jury consider only two possible verdicts on each offense without the option of a verdict on a lesser included offense, she was not entitled to plain error review. *State v. Alderson*, — N.C. App. —, 618 S.E.2d 844, 2005 N.C. App. LEXIS 2033 (2005).

No Plain Error Shown. — In drug case, defendant failed to show that there was plain

error in the use of pattern jury instructions with regards to constructive possession because there was little likelihood that the jury would have reached a different conclusion had special instructions been given. *State v. Shine*, — N.C. App. —, 619 S.E.2d 895, 2005 N.C. App. LEXIS 2306 (2005).

Review Available Despite Failure to Object. — Even though defendant failed to object or raise as plain error the jury instructions given in a case relating to damage to computers, appellate court could review the case under N.C. App. Proc., Rule 2 because there was limited case law and no jury instructions on the crime. *State v. Johnston*, — N.C. App. —, 618 S.E.2d 807, 2005 N.C. App. LEXIS 2034 (2005).

C. Sufficiency of Evidence.

By introducing evidence, etc.

By putting on evidence after the State rests its case, a defendant waives his right to appeal the denial of the initial motion to dismiss made at the close of the State's case. *State v. Yelton*, — N.C. App. —, 623 S.E.2d 594, 2006 N.C. App. LEXIS 44 (2006).

Necessity of Motion to Dismiss. —

As defendant did not move to dismiss the charge of robbery with a dangerous weapon at the close of the State's evidence nor at the close of all the evidence, pursuant to N.C. R. App. P. 10(b)(3), his assignment of error as to the sufficiency of the evidence was dismissed. *State v. Battle*, — N.C. App. —, 615 S.E.2d 733, 2005 N.C. App. LEXIS 1436 (2005).

Assigning error to a conclusion of law on the generalized basis of "insufficiency of the evidence" does not preserve the issue of the sufficiency of evidence supporting the findings of fact on which the conclusion was based; a father failed to preserve the issue of whether the evidence supported the trial court's findings in his termination case, where the father did not assign error to any of the trial court's findings of fact, and thus the trial court's findings were presumed to be supported by competent evidence and were binding on appeal. *In re J.D.S.*, 170 N.C. App. 244, 612 S.E.2d 350, 2005 N.C. App. LEXIS 1013 (2005), cert. denied, — U.S. —, 360 N.C. 64, 623 S.E.2d 584 (2005).

IV. ASSIGNMENTS OF ERROR.

A. Form; Record References.

Assignments of error are now mandatory to perfect an appeal, etc.

When it was alleged that a mother's parental rights to two children should be terminated because she (1) neglected them while they were in an agency's care within the meaning of G.S. 7B-101, under G.S. 7B-1111(a)(1), (2) willfully left the children in foster care for more than 12

months without showing reasonable progress to correct the conditions that led to their removal, under G.S. 7B-1111(a)(2), and (3) willfully failed to pay a reasonable portion of the cost of the children's care while in an agency's custody, under G.S. 7B-1111(a)(3), and the petition was sustained on all three grounds, when the mother objected to findings as to only one ground on appeal, the other findings were binding, under N.C. R. App. P. 10, and, as only one ground had to be found to terminate parental rights, it was unnecessary to consider the mother's appellate argument as to the ground she challenged. *In re J.A.A.*, — N.C. App. —, 623 S.E.2d 45, 2005 N.C. App. LEXIS 2706 (2005).

Failure to Specify Enumerated Findings of Fact or Conclusions of Law. — While defendants failed to specify any enumerated findings of fact or conclusions of law, as required by N.C. R. App. P. 10(c)(1) but did refer to the page of the record where the disputed finding of fact was located, the court chose to review the assignments of error given the provision in N.C. R. App. P. 2 allowing the court to review an appeal despite rules violations. *Davis v. Columbus County Schs.*, — N.C. App. —, 622 S.E.2d 671, 2005 N.C. App. LEXIS 2709 (2005).

Numbering of Exceptions. —

Guarantor's appeal was dismissed because the guarantor failed to comply with N.C. R. App. P. 10 and N.C. R. App. P. 28 by failing to: (1) separate each question presented within the argument section of the brief; (2) reference each assignment of error with numbers and pages where they appeared in the record on appeal; (3) support the arguments with stated or cited authority; (4) provide a full and complete statement of the facts; and (5) number each assignment of error separately in the record on appeal. *Consol. Elec. Distribs., Inc. v. Dorsey*, 170 N.C. App. 684, 613 S.E.2d 518, 2005 N.C. App. LEXIS 1078 (2005).

Assignments of Error Held Insufficient.

In a bond forfeiture case, a surety's substantive due process issue was not preserved for appellate review because it was not designated as an assignment of error. *State v. Ferrer*, 170 N.C. App. 131, 611 S.E.2d 881, 2005 N.C. App. LEXIS 892 (2005).

Appeal was dismissed where administrator violated appellate rules by, *inter alia*, failing to number the assignments of error or make specific record references; moreover, the second stated assignment of error did not state plainly, concisely, and without argumentation the legal basis upon which error was assigned. *Viar v. N.C. DOT*, 359 N.C. 400, 610 S.E.2d 360, 2005 N.C. LEXIS 360 (2005).

Purported assignment of error that simply stated that the appellant assigned "as error the following entry: Entry of the Order for Modifi-

cation of Alimony filed October 7, 2004," with no record references and no statement of legal basis for the assignment of error, did not comply with N.C. App. Proc., Rule 10; suspending the rules pursuant to N.C. App. Proc., Rule 2 would have involved the court in creating the appeal, and would not have been fair to the appellee. *Broderick v. Broderick*, — N.C. App. —, 623 S.E.2d 806, 2006 N.C. App. LEXIS 188 (2006).

Appeal was subject to dismissal where, *inter alia*, a former husband set out 119 assignments of error, purporting to assign error to almost every finding of fact and conclusion of law made by the trial court, where each finding or conclusion was the subject of three identical assignments of error, where assignments of error referenced following each question were not pertinent to the legal issues presented, and where the former husband's assertion that a given finding, conclusion, or ruling was "erroneous as a matter of law" failed to identify issues actually briefed on appeal. *Walker v. Walker*, — N.C. App. —, 624 S.E.2d 639, 2005 N.C. App. LEXIS 2586 (2005).

Husband failed to preserve issues for appellate review where he set out 119 assignments of error, purporting to assign error to almost every finding of fact and conclusion of law made by the trial court; the assignments of error followed a repetitive pattern, used the same phrasing, included no reference to issues briefed on appeal, and failed to state plainly the legal basis upon which error was assigned. *Walker v. Walker*, — N.C. App. —, 620 S.E.2d 911, 2005 N.C. App. LEXIS 2390 (2005).

B. Jury Instructions.

Waiver by Failure to Present Question on Appeal. —

When defendant orally requested an instruction that it was legal to possess a controlled substance pursuant to a prescription, his claim on appeal that the trial court did not give this instruction could not be considered because the instruction was not submitted to the trial court in writing, as required by G.S. 15A-1231(a), and the substance of the proposed instruction was not contained in the appellate record. *State v. Sanders*, 171 N.C. App. 46, 613 S.E.2d 708, 2005 N.C. App. LEXIS 1158 (2005), *aff'd*, 360 N.C. 170, 622 S.E.2d 492 (2005).

D. Plain Error.

Even Though Such Errors Were Not Brought to Attention of Court. —

After considering defendant's assignment of error regarding the trial court's erroneous activation of his suspended sentences under G.S. 15A-1446(d)(18), where those sentences were unconstitutionally aggravated, because said sentences were imposed without his stipulation

or by a submission to and finding by the jury beyond a reasonable doubt, said sentences were vacated and a new sentencing hearing was ordered consistent with the North Carolina Supreme Court's decisions in *Allen* and *Speight*, despite defendant's failure to raise an objection at trial. *State v. McMahan*, — N.C. App. —, 621 S.E.2d 319, 2005 N.C. App. LEXIS 2477 (2005).

Failure to Adequately Allege Plain Error. — Trial court properly allowed the State to cross-examine defendant regarding his prior out-of-state conviction; defendant failed to preserve the issue of review pursuant to N.C. R. App. P. 10, and defendant failed to show that plain error applied, as defendant failed to show that different outcome would have been likely if the evidence had not been admitted. *State v. Ayscue*, 169 N.C. App. 548, 610 S.E.2d 389, 2005 N.C. App. LEXIS 677 (2005).

Waiver of Plain Error Argument. —

Because defendant did not object at trial to a statement by the trial court, he failed to preserve the issue for appeal. Though the issue could have been reviewed for plain error, pursuant to N.C. R. App. P. 10(c)(4), because defendant did not argue plain error on appeal, he therefore waived his right to plain error. *State v. Harrington*, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. *State v. Rattis*, 360 N.C. 70, 623 S.E.2d 36 (2005).

Plain Error Not Shown. —

Appellate court applied a plain error review because defendant failed to preserve his assignment of error regarding the admission of letters into evidence for review; given the additional evidence against defendant, the admission of the letters did not have a probable impact on the jury's finding of defendant's guilt. *State v. Curry*, — N.C. App. —, 615 S.E.2d 327, 2005 N.C. App. LEXIS 1312 (2005).

Trial court did not commit plain error by failing to intervene ex mero motu to stop the district attorney from continuing an improper closing argument after defendant's objection was sustained, as the instructional error did not have a probable impact on the jury's finding of guilt, in light of the fact that the evidence presented to the jury contained ample evidence of defendant's heroin use and involvement in the offenses charged. *State v. Goblet*, — N.C. App. —, 618 S.E.2d 257, 2005 N.C. App. LEXIS 1929 (2005).

Where the State presented substantial evidence of guilt of second-degree sexual offense through the testimony of a cellmate, which was corroborated by two other inmates who heard defendant bragging about the sexual assault, the trial court did not commit plain error in admitting evidence of defendant's prior acts, despite defendant's claim that the trial court failed to use a balancing test. *State v. Locklear*,

— N.C. App. —, 621 S.E.2d 254, 2005 N.C. App. LEXIS 2465 (2005).

Plain Error Review Held Appropriate. —

It was plain error for a medical expert to bolster the credibility of the victim in violation of G.S. 8C-1, N.C. R. Evid. 702(a), so defendant did not have to preserve the claim for review pursuant to N.C.R. App. P. 10(b)(1); however, the error did not prejudice defendant as the State presented sufficient evidence from other sources to establish the victim's credibility. *State v. Blizzard*, 169 N.C. App. 285, 610 S.E.2d 245, 2005 N.C. App. LEXIS 680 (2005).

Admission of Testimony Not Plain Error.

Where defendant did not object to the prosecutor cross-examining him as to his alleged prior assaults, the appellate court's review of the record and transcripts satisfied that court that the defendant did not meet the test for finding plain error because the State presented strong evidence of defendant's guilt through the testimony of three eye witnesses who were present when the victim, a police officer, was shot, with all three giving consistent testimony identifying defendant as the shooter; therefore it was not possible for the appellate court to say that the cross-examination amounted to a miscarriage of justice or denied defendant a fundamental right. *State v. Augustine*, 359 N.C. 709, 616 S.E.2d 515, 2005 N.C. LEXIS 836 (2005).

V. CROSS-ASSIGNMENTS BY APPELLEE.

Cross-Assignments of Error Dismissed for Lack of Alternative Basis in Law. —

Since a landowner's arguments on appeal in challenging the amount it was awarded as damages for a trespass to property attempted to show how the trial court erred in its findings of fact and conclusions of law, and since those arguments did not provide an alternate basis for supporting the trial court's award of damages, the landowner improperly raised that challenge in across-assignment of error. The correct method for the landowner to have raised that question on appeal was to have raised the issue on a cross appeal, but the landowner failed to properly cross-appeal, so the court found that the landowner waived the appellate court's consideration of the damage issue and the appellate court dismissed the landowner's cross-assignment of error. *CDC Pineville, LLC v. UDRT of N.C., LLC*, — N.C. App. —, 622 S.E.2d 512, 2005 N.C. App. LEXIS 2617 (2005).

Issues for Cross-Appeal Not Proper Cross-Assignments. —

Where the hospital, whose motion for a directed verdict was granted in the trial court, filed cross-assignments of error on appeal, the inadmissibility of the expert testimony put

forth by the infant, mother, and father was not an alternative basis in law to support the directed verdict; as such, this was not the proper subject of a cross-assignment of error under N.C. R. App. P. 10(d). *Pope v. Cumberland County Hosp. Sys.*, — N.C. App. —, 615 S.E.2d 715, 2005 N.C. App. LEXIS 1357 (2005).

Since a landowner's arguments on appeal in challenging the amount it was awarded as damages for a trespass to property attempted to show how the trial court erred in its findings of fact and conclusions of law, and since those arguments did not provide an alternate basis for supporting the trial court's award of damages, the landowner improperly raised that challenge in across-assignment of error. The correct method for the landowner to have raised that question on appeal was to have raised the issue on a cross appeal, but the landowner failed to properly cross-appeal, so the court found that the landowner waived the appellate court's consideration of the damage issue and the appellate court dismissed the landowner's cross-assignment of error. *CDC*

Pineville, LLC v. UDRT of N.C., LLC., — N.C. App. —, 622 S.E.2d 512, 2005 N.C. App. LEXIS 2617 (2005).

Failure to Cross-Appeal. —

Since a landowner's arguments on appeal in challenging the amount it was awarded as damages for a trespass to property attempted to show how the trial court erred in its findings of fact and conclusions of law, and since those arguments did not provide an alternate basis for supporting the trial court's award of damages, the landowner improperly raised that challenge in across-assignment of error. The correct method for the landowner to have raised that question on appeal was to have raised the issue on a cross appeal, but the landowner failed to properly cross-appeal, so the court found that the landowner waived the appellate court's consideration of the damage issue and the appellate court dismissed the landowner's cross-assignment of error. *CDC Pineville, LLC v. UDRT of N.C., LLC.*, — N.C. App. —, 622 S.E.2d 512, 2005 N.C. App. LEXIS 2617 (2005).

Rule 11. Settling the record on appeal.

CASE NOTES

Dismissal for Failure to Comply. —

Corporation's appeal was dismissed as an executor served a corporation with amendments and objections to the proposed record, but there was no indication that the corporation filed for judicial settlement of the record within the time prescribed by N.C. R. App. 11(c); the corporation continued to discuss the record with the executor, who attempted to cooperate while expressly reserving the right to assert an "untimely docketing of (the) record,"

and the corporation filed the record after concurrence on the record was reached, which was well after the time limitations set forth in N.C. R. App. 11(c) and 12(a). *White v. Carver*, — N.C. App. —, 622 S.E.2d 718, 2005 N.C. App. LEXIS 2744 (2005).

Cited in *State v. Berryman*, 170 N.C. App. 336, 612 S.E.2d 672, 2005 N.C. App. LEXIS 1004 (2005), *aff'd*, — N.C. —, 624 S.E.2d 350 (2006).

Rule 12. Filing the record; Docketing the appeal; Copies of the record.

CASE NOTES

I. In General.

I. IN GENERAL.

Time for Filing Record. —

Corporation's appeal was dismissed as an executor served a corporation with amendments and objections to the proposed record, but there was no indication that the corporation filed for judicial settlement of the record within the time prescribed by N.C. R. App. 11(c); the corporation continued to discuss the

record with the executor, who attempted to cooperate while expressly reserving the right to assert an "untimely docketing of (the) record," and the corporation filed the record after concurrence on the record was reached, which was well after the time limitations set forth in N.C. R. App. 11(c) and 12(a). *White v. Carver*, — N.C. App. —, 622 S.E.2d 718, 2005 N.C. App. LEXIS 2744 (2005).

**ARTICLE III. REVIEW BY SUPREME COURT OF
APPEALS ORIGINALLY DOCKETED IN COURT
OF APPEALS: APPEALS OF RIGHT;
DISCRETIONARY REVIEW**

Rule 14. Appeals of right from Court of Appeals to Supreme Court under G.S. 7A-30.

CASE NOTES

Applied in *Squire v. Pol*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 37246 (W.D.N.C. Sept. 13, 2005).

Rule 15. Discretionary review on certification by Supreme Court under G.S. 7A-31.

CASE NOTES

Applied in *Squire v. Pol*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 37246 (W.D.N.C. Sept. 13, 2005).

Rule 16. Scope of review of decisions of Court of Appeals.

CASE NOTES

Administrative Hearing Review. — Substantial evidence in the record supported an administrative law judge's findings and its dismissal of a day care's petition for a contested case hearing where the day care filed nothing in nearly six months following the filing of the

petition, despite receiving several orders from the administrative law judge to file and serve prehearing statements and other responses to motions. *Lincoln v. N.C. HHS*, — N.C. App. —, 616 S.E.2d 622, 2005 N.C. App. LEXIS 1804 (2005).

**ARTICLE IV. DIRECT APPEALS FROM
ADMINISTRATIVE AGENCIES TO
APPELLATE DIVISION**

Rule 18. Taking appeal; Record on appeal — Composition and settlement.

CASE NOTES

Cited in *Smythe v. Waffle House*, 170 N.C. App. 361, 612 S.E.2d 345, 2005 N.C. App. LEXIS 999 (2005), cert. denied, 360 N.C. 66, 621 S.E.2d 876 (2005).

ARTICLE V. EXTRAORDINARY WRITS

Rule 21. Certiorari.

CASE NOTES

I. In General.

I. IN GENERAL.**Writ of Certiorari Limited. —**

When the North Carolina Industrial Commission exceeded its authority by finding a prior version of G.S. 97-26(b) unconstitutional, the question of the statute's constitutionality was not properly presented to an appellate court on appeal of the Commission's decision because, among other reasons, no party filed a certiorari petition, pursuant to N.C. R. App. P. 21, nor did a party seek suspension of the Rules of Appellate Procedure, under N.C. R. App. P. 2, nor did the Commission certify the question to the appellate court, under G.S. 97-86. *Carlinas Med. Ctr. v. Empls & Carriers Listed in Exhibit A*, — N.C. App. —, 616 S.E.2d 588, 2005 N.C. App. LEXIS 1773 (2005).

Since none of the circumstances set out in G.S. 15A-1444(e) applied to defendant's guilty plea, the court was without authority under N.C. R. App. P.21 to issue a writ of certiorari.

State v. Hadden, — N.C. App. —, 624 S.E.2d 417, 2006 N.C. App. LEXIS 190 (2006).

Appellate court lacked jurisdiction to hear defendant's appeal where defendant failed to give timely notice of appeal, and defendant's brief did not meet requirements of a petition for a writ of certiorari as set forth in N.C. R. App. P. 21(c); the appellate court declined to exercise its discretion under N.C. R. App. P. 2 to correct the defects in defendant's purported petition for writ of certiorari, and additionally, declined to exercise its discretion and denied defendant's purported petition for writ of certiorari. *State v. McCoy*, — N.C. App. —, 615 S.E.2d 319, 2005 N.C. App. LEXIS 1319 (2005).

Applied in *Brown v. City of Winston-Salem*, 171 N.C. App. 266, 614 S.E.2d 599, 2005 N.C. App. LEXIS 1266 (2005); *In re Pedestrian Walkway Failure*, — N.C. App. —, 618 S.E.2d 796, 2005 N.C. App. LEXIS 2022 (2005).

ARTICLE VI. GENERAL PROVISIONS**Rule 26. Filing and service.****CASE NOTES**

Review of Significant Issues Warranted Under N.C. R. App. P. 2. — Since a plaintiff's violations of N.C. R. App. P. 26(g), 28(b)(5)-(6), (d)(1)c., and 41(b)(2) were not so egregious as to invoke dismissal, the appeals court elected to review the significant issues of the employee's

appeal of a summary judgment dismissing her wrongful termination/discrimination claims pursuant to N.C. R. App. P. 2. *Youse v. Duke Energy Corp.*, 171 N.C. App. 187, 614 S.E.2d 396, 2005 N.C. App. LEXIS 1209 (2005).

Rule 27. Computation and extension of time.**CASE NOTES**

The Time for Taking An Appeal May Not Be Enlarged by the Appellate Courts. —

Appellate court lacked jurisdiction to hear defendant's appeal where defendant failed to give timely notice of appeal, and defendant's brief did not meet requirements of a petition for a writ of certiorari as set forth in N.C. R. App. P. 21(c); the appellate court declined to exercise its discretion under N.C. R. App. P. 2 to correct

the defects in defendant's purported petition for writ of certiorari, and additionally, declined to exercise its discretion and denied defendant's purported petition for writ of certiorari. *State v. McCoy*, — N.C. App. —, 615 S.E.2d 319, 2005 N.C. App. LEXIS 1319 (2005).

Cited in *State v. Johnston*, — N.C. App. —, 618 S.E.2d 807, 2005 N.C. App. LEXIS 2034 (2005).

Rule 28. Briefs: Function and content.**CASE NOTES****I. In General.****I. IN GENERAL.**

This Rule Requires That a Question Be Presented and Argued in the Brief in order to Obtain Appellate Review — When a

surety appealed the denial of its motion for relief from a forfeiture, it did not state the grounds for appellate review in its brief, as required by N.C. R. App. P. 28(b)(4). *State v.*

Sanchez, — N.C. App. —, 623 S.E.2d 780, 2005 N.C. App. LEXIS 2705 (2005).

Neighbors' claim in their directed verdict motion that there was insufficient evidence as to whether property owners had an easement by prescription over the neighbors' property was not considered on appeal, as the jury failed to reach the issue and the neighbors failed to raise the issue in their brief on appeal. *Boggess v. Spencer*, — N.C. App. —, 620 S.E.2d 10, 2005 N.C. App. LEXIS 2114 (2005).

Assignments of error not argued in defendant's brief are deemed waived.

In a bond forfeiture case, a surety's substantive due process issue was not preserved for appellate review because it was not designated as an assignment of error. *State v. Ferrer*, 170 N.C. App. 131, 611 S.E.2d 881, 2005 N.C. App. LEXIS 892 (2005).

Where an appellant does not present an argument in support of an assignment of error, the assignment of error is deemed abandoned pursuant to N.C.R. App. P. 28(b)(6). *State v. Harrington*, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. *State v. Rattis*, 360 N.C. 70, 623 S.E.2d 36 (2005).

Where an insurer appealed an order, and an insured also assigned error to the trial court's order denying the insurer's motion to compel discovery and for sanctions against the insured, the appellate court deemed the insured's assignments of error abandoned, pursuant to N.C. R. App. P. 28(b)(6), as he failed to offer any support in his brief for those arguments on appeal. *Nationwide Mut. Fire Ins. Co. v. Bourlon*, — N.C. App. —, 617 S.E.2d 40, 2005 N.C. App. LEXIS 1789 (2005), aff'd, — N.C. —, 625 S.E.2d 779 (2006).

Where an employee made a claim for benefits before the North Carolina Industrial Commission (NCIC), arising from his exposure to asbestosis, and upon his death, his widow who was appointed as his administratrix, filed the necessary form for substitution into that proceeding, the employer and its insurer could not seek review of their claim that the form filed was insufficient to bring the issue of death benefits before the NCIC, as they failed to comply with N.C. R. App. P. 28(b)(6); they did not cite to any authority to support their contention, and accordingly, the court could not revisit the NCIC's determination on that issue. *Payne v. Charlotte Heating & Air Conditioning*, — N.C. App. —, 616 S.E.2d 356, 2005 N.C. App. LEXIS 1782 (2005).

Questions Must Be Presented in Brief. —

Where defendant failed to argue an assignment of error in the appellate brief, the assignment was deemed abandoned under N.C. R. App. P. 28(b)(6). *State v. Price*, 170 N.C. App. 672, 613 S.E.2d 60, 2005 N.C. App. LEXIS 1085 (2005).

Mother's cursory argument concerning neglect and abandonment was predicated upon not receiving proper notice of the motion to terminate and thus, her assignment of error concerning G.S. 7B-1111 were deemed abandoned under N.C. R. App. P. 28(b)(6). In re P.L.P., — N.C. App. —, 618 S.E.2d 241, 2005 N.C. App. LEXIS 1921 (2005), aff'd, — N.C. —, 625 S.E.2d 779 (2006).

Because the purported class of retail employees failed to cite and argue an assignment of error in their appellate briefing, the assignment of error was deemed abandoned under N.C. R. App. P. 28(a). *Harrison v. Wal-Mart Stores, Inc.*, 170 N.C. App. 545, 613 S.E.2d 322, 2005 N.C. App. LEXIS 1082 (2005).

An Unsupported Assertion of Plain Error Will Fail. —

Defendant's failure to support his contention that the trial court committed plain error by allowing a witness to describe what she saw on a computer precluded appellate review of that assignment of error. *State v. Verrier*, — N.C. App. —, 617 S.E.2d 675, 2005 N.C. App. LEXIS 1899 (2005).

Argument in Brief Did Not Correspond to Assignment of Error. —

In the bond forfeiture case, the insurer, pursuant to N.C. R. App. P. 28(b)(6), waived its argument on appeal that the trial court erred when it failed to make a factual finding regarding whether the insurer received notice of the bond forfeiture and requested a remand for a factual finding; the insurer cited no cases in support of this argument and did not argue the point made in the assignment of error. *State v. Lopez*, 169 N.C. App. 816, 611 S.E.2d 197, 2005 N.C. App. LEXIS 806 (2005).

Arguments Too Vague for Appellate Review. — Contractors' arguments that fees charged by a village were unconstitutional, were inconsistent with both the state and federal constitutions, and infringed on guaranteed liberties were too vague for appellate review. *Bald Head Island, Ltd. v. Village of Bald Head Island*, — N.C. App. —, 624 S.E.2d 406, 2006 N.C. App. LEXIS 177 (2006).

Abandonment of Assignments of Error. —

It was not the duty of the appellate court to supplement an appellant's brief with legal authority or arguments not contained therein; therefore, the appellant's assignment of error was deemed abandoned by virtue of N.C. R. App. P. 28(b)(6) when it failed to provide legal authority or argument for an assignment of error. *Goodson v. P.H. Glatfelter Co.*, — N.C. App. —, 615 S.E.2d 350, 2005 N.C. App. LEXIS 1315 (2005).

Where defendant failed to argue on appeal certain assignments of error, the assignments were abandoned under N.C. R. App. P. 28(b). *State v. Delaney*, 171 N.C. App. 141, 613 S.E.2d

699, 2005 N.C. App. LEXIS 1160 (2005).

Pursuant to N.C. R. App. P. 28(b)(6), omitted assignments of error are deemed abandoned. *State v. Murphy*, — N.C. App. —, 616 S.E.2d 567, 2005 N.C. App. LEXIS 1786 (2005).

Mother's cursory argument concerning neglect and abandonment was predicated upon not receiving proper notice of the motion to terminate and thus, her assignment of error concerning G.S. 7B-1111 were deemed abandoned under N.C. R. App. P. 28(b)(6). In *re P.L.P.*, — N.C. App. —, 618 S.E.2d 241, 2005 N.C. App. LEXIS 1921 (2005), *aff'd*, — N.C. —, 625 S.E.2d 779 (2006).

Abandonment of Issue. —

In a case involving an appeal from a neglect and dependency finding, a mother abandoned the argument that the findings were unsupported by the evidence; therefore, the appellate court was limited to reviewing whether or not the findings of fact supported the conclusions of law. In *re P.M.*, 169 N.C. App. 423, 610 S.E.2d 403, 2005 N.C. App. LEXIS 678 (2005).

Although an employee originally assigned error to several of the North Carolina Industrial Commission's findings as unsupported by the evidence, his brief on appeal contained only arguments pertaining to the Commission's conclusions of law; thus, the employee's assignments of error to the Commission's findings were deemed abandoned pursuant to N.C. R. App. P. 28(a). *Bursell v. N.C. Indus. Comm'n I.C. No. 177846*, — N.C. App. —, 616 S.E.2d 342, 2005 N.C. App. LEXIS 1427 (2005).

Where a defendant failed to argue assignments of error, they were deemed abandoned pursuant to N.C. R. App. P. 28(b)(6). *State v. Flemming*, 171 N.C. App. 413, 615 S.E.2d 310, 2005 N.C. App. LEXIS 1260 (2005).

Failure to Cite Authority. —

Constitutional claims based on the imposition of a special assessment for an inlet's relocation were not reviewed on appeal because an owner failed to cite any authority to support the claim that his constitutional rights were violated; therefore, they were not properly preserved for review. *Parker v. New Hanover County*, — N.C. App. —, 619 S.E.2d 868, 2005 N.C. App. LEXIS 2227 (2005).

Trial court properly confirmed an arbitration award, as property owners failed to support any of their various theories challenging the award with citation to authority, in violation of N.C. R. App. P. 28(b)(6). *Creekside Constr. Co. v. Dowler*, — N.C. App. —, 616 S.E.2d 609, 2005 N.C. App. LEXIS 1783 (2005).

Failure to Discuss Assignment of Error in Brief. —

Where defendant failed to assign error to or provide any argument in defendant's appellate brief regarding the trial court's *ex parte* communication, the appellate court, pursuant to N.C. R. App. P. 28(b)(6), refused to consider the

issue. *State v. Phillips*, — N.C. App. —, 615 S.E.2d 382, 2005 N.C. App. LEXIS 1369 (2005), cert. denied, appeal dismissed, — N.C. —, 622 S.E.2d 628 (2005).

Where defendant's brief contained arguments supporting only one of the eleven original assignments of error on appeal, the omitted assignments of error were deemed abandoned under N.C. R. App. P. 28(b)(6). *State v. Champion*, — N.C. App. —, 615 S.E.2d 366, 2005 N.C. App. LEXIS 1364 (2005).

Assigning error to a conclusion of law on the generalized basis of "insufficiency of the evidence" does not preserve the issue of the sufficiency of evidence supporting the findings of fact on which the conclusion was based; a father failed to preserve the issue of whether the evidence supported the trial court's findings in his termination case, where the father did not assign error to any of the trial court's findings of fact, and thus the trial court's findings were presumed to be supported by competent evidence and were binding on appeal. In *re J.D.S.*, 170 N.C. App. 244, 612 S.E.2d 350, 2005 N.C. App. LEXIS 1013 (2005), cert. denied, — U.S. —, 360 N.C. 64, 623 S.E.2d 584 (2005).

Multiple Errors in Brief. —

Guarantor's appeal was dismissed because the guarantor failed to comply with N.C. R. App. P. 10 and N.C. R. App. P. 28 by failing to: (1) separate each question presented within the argument section of the brief; (2) reference each assignment of error with numbers and pages where they appeared in the record on appeal; (3) support the arguments with stated or cited authority; (4) provide a full and complete statement of the facts; and (5) number each assignment of error separately in the record on appeal. *Consol. Elec. Distribs., Inc. v. Dorsey*, 170 N.C. App. 684, 613 S.E.2d 518, 2005 N.C. App. LEXIS 1078 (2005).

Appellants Complied With Subdivision (b)(4). — Where the trial court denied, in part, the motion to stay and compel arbitration filed by defendants salesperson and developer, defendants properly recognized the interlocutory nature of their appeal and argued the grounds for immediate appellate review, pursuant to N.C. R. App. P. 28(b)(4). *Brown v. Centex Homes*, — N.C. App. —, 615 S.E.2d 86, 2005 N.C. App. LEXIS 1356 (2005).

Appendix as Part of Record on Appeal. —

Where defendant's appellate brief, challenging defendant's first-degree murder conviction, did not cite the specific assignment of error that defendant contended supported defendant's one argument that was not waived and defendant did not attach to the brief the pertinent portions of the trial proceedings related to the argument, defendant violated N.C. R. App. P. 28(b)(6), (d)(1); however, the appellate court,

rather than deeming the error waived, exercised its discretion under N.C. R. App. P. 2 to examine the merits of defendant's argument. *State v. Champion*, — N.C. App. —, 615 S.E.2d 366, 2005 N.C. App. LEXIS 1364 (2005).

Page Limitation. —

Because the appellee's brief exceeded the page limit under N.C. R. App. P. 28(j), and the appellate court denied the appellee's motion to waive the page limit, the appellate court did not consider that part of the appellee's brief that exceeded the allowable page limit. *Watts v. Borg Warner Auto., Inc.*, 171 N.C. App. 1, 613 S.E.2d 715, 2005 N.C. App. LEXIS 1159 (2005), *aff'd*, 360 N.C. 169, 622 S.E.2d 492 (2005).

Sanction for Lengthy Brief. —

North Carolina Court of Appeals did not consider that portion of the brief which exceeded the N.C. R. App. P. 28(j) 35-page limit. *D'Aquisto v. Mission St. Joseph's Health Sys.*, 171 N.C. App. 216, 614 S.E.2d 583, 2005 N.C. App. LEXIS 1269 (2005).

Appellate court considered plaintiff's interlocutory appeal of a summary judgment order, even though her brief did not contain the statement required by N.C. R. App. P. 28(b)(4) regarding whether a substantial right would be affected if the appeal were not immediately reviewed, since, during oral arguments, both parties argued that the appeal was interlocutory and gave reasons why the trial court's ruling was immediately appealable. *McCutchen v. McCutchen*, 170 N.C. App. 1, 612 S.E.2d 162, 2005 N.C. App. LEXIS 904 (2005).

Review of Significant Issues Warranted Under N.C. R. App. P. 2. — Since a plaintiff's violations of N.C. R. App. P. 26(g), 28(b)(5)-(6), (d)(1)c., and 41(b)(2) were not so egregious as to invoke dismissal, the appeals court elected to review the significant issues of the employee's appeal of a summary judgment dismissing her wrongful termination/discrimination claims pursuant to N.C. R. App. P. 2. *Youse v. Duke Energy Corp.*, 171 N.C. App. 187, 614 S.E.2d 396, 2005 N.C. App. LEXIS 1209 (2005).

Applied in *Schenk v. HNA Holdings, Inc.*, 170 N.C. App. 555, 613 S.E.2d 503, 2005 N.C. App. LEXIS 1067 (2005); *State v. McNeill*, 170 N.C. App. 574, 613 S.E.2d 43, 2005 N.C. App. LEXIS 1068 (2005), cert. denied, 360 N.C. 73, 622 S.E.2d 626 (2005); *In re T.K.*, — N.C. App. —, 613 S.E.2d 739, 2005 N.C. App. LEXIS 1191 (2005), *aff'd*, 360 N.C. 163, 622 S.E.2d 494 (2005); *State v. Houston*, 169 N.C. App. 367, 610 S.E.2d 777, 2005 N.C. App. LEXIS 606 (2005); *State v. Harrison*, 169 N.C. App. 257, 610 S.E.2d 407, 2005 N.C. App. LEXIS 608 (2005), cert. denied, 360 N.C. 71, 622 S.E.2d 496 (2005); *Brown v. Kroger Co.*, 169 N.C. App. 312, 610 S.E.2d 447, 2005 N.C. App. LEXIS 611 (2005); *State v. Millsaps*, 169 N.C. App. 340, 610 S.E.2d 437, 2005 N.C. App. LEXIS 617

(2005); *State v. Belton*, 169 N.C. App. 350, 610 S.E.2d 283, 2005 N.C. App. LEXIS 618 (2005); *State v. Carmon*, 169 N.C. App. 750, 611 S.E.2d 211, 2005 N.C. App. LEXIS 794 (2005); *State v. Howell*, 169 N.C. App. 741, 611 S.E.2d 200, 2005 N.C. App. LEXIS 795 (2005), cert. denied, — N.C. —, 622 S.E.2d 500 (2005), cert. denied, 360 N.C. 71, 622 S.E.2d 500 (2005); *State v. Torres*, 171 N.C. App. 419, 615 S.E.2d 36, 2005 N.C. App. LEXIS 1200 (2005); *Cannon v. Goodyear Tire & Rubber Co.*, 171 N.C. App. 254, 614 S.E.2d 440, 2005 N.C. App. LEXIS 1254 (2005), cert. denied, 360 N.C. 61, 621 S.E.2d 177 (2005); *State v. Ledwell*, 171 N.C. App. 328, 614 S.E.2d 412, 2005 N.C. App. LEXIS 1259 (2005), cert. denied, 360 N.C. 73, 622 S.E.2d 624 (2005); *In re D.J.D.*, 171 N.C. App. 230, 615 S.E.2d 26, 2005 N.C. App. LEXIS 1268 (2005); *State v. Gonzalez-Fernandez*, 170 N.C. App. 45, 612 S.E.2d 148, 2005 N.C. App. LEXIS 900 (2005); *Smith v. Richardson Sports Ltd.*, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 908 (May 3, 2005); *In re E.T.S.*, — N.C. App. —, 623 S.E.2d 300, 2005 N.C. App. LEXIS 2724 (2005); *Welch Contr., Inc. v. N.C. DOT*, — N.C. App. —, 622 S.E.2d 691, 2005 N.C. App. LEXIS 2725 (2005); *In re D.W.*, 171 N.C. App. 496, 615 S.E.2d 90, 2005 N.C. App. LEXIS 1358 (2005); *Alexander v. Cumberland County Bd. of Educ.*, — N.C. App. —, 615 S.E.2d 408, 2005 N.C. App. LEXIS 1366 (2005); *State v. Caudle*, — N.C. App. —, 616 S.E.2d 8, 2005 N.C. App. LEXIS 1430 (2005); *State v. Everette*, — N.C. App. —, 616 S.E.2d 237, 2005 N.C. App. LEXIS 1437 (2005); *Morton Bldgs., Inc. v. Tolson*, — N.C. App. —, 615 S.E.2d 906, 2005 N.C. App. LEXIS 1579 (2005); *State v. Jacobs*, — N.C. App. —, 616 S.E.2d 306, 2005 N.C. App. LEXIS 1586 (2005); *In re B.D.*, — N.C. App. —, 620 S.E.2d 913, 2005 N.C. App. LEXIS 2387 (2005); *State v. Watts*, — N.C. App. —, 616 S.E.2d 290, 2005 N.C. App. LEXIS 1588 (2005); *In re J.B.*, — N.C. App. —, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005); *State v. Norris*, — N.C. App. —, 617 S.E.2d 298, 2005 N.C. App. LEXIS 1787 (2005); *Early v. County of Durham Dep't of Soc. Servs.*, — N.C. App. —, 616 S.E.2d 553, 2005 N.C. App. LEXIS 1788 (2005); *State v. Bellamy*, — N.C. App. —, 617 S.E.2d 81, 2005 N.C. App. LEXIS 1793 (2005); *Helsius v. Robertson*, — N.C. App. —, 621 S.E.2d 263, 2005 N.C. App. LEXIS 2469 (2005); *Mayfield v. Parker Hannifin*, — N.C. App. —, 621 S.E.2d 243, 2005 N.C. App. LEXIS 2472 (2005); *State v. Edwards*, — N.C. App. —, 621 S.E.2d 333, 2005 N.C. App. LEXIS 2487 (2005); *State v. Cummings*, — N.C. App. —, 622 S.E.2d 183, 2005 N.C. App. LEXIS 2618 (2005).

Cited in *N.C. Sch. Bds. Ass'n v. Moore*, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005); *State v. Nettles*, 170 N.C. App. 100, 612 S.E.2d 172, 2005 N.C. App. LEXIS 950 (2005); *State v. Shearin*, 170 N.C. App. 222, 612 S.E.2d

371, 2005 N.C. App. LEXIS 1002 (2005), appeal dismissed, cert. denied, — N.C. —, 624 S.E.2d 369 (2005); *Davis v. Columbus County Schs.*, — N.C. App. —, 622 S.E.2d 671, 2005 N.C. App. LEXIS 2709 (2005); *In re C.E.L.*, 171 N.C. App. 468, 615 S.E.2d 427, 2005 N.C. App. LEXIS 1361 (2005); *State v. Duff*, — N.C. App. —, 615 S.E.2d 373, 2005 N.C. App. LEXIS 1367 (2005); *Gorsuch v. Dees*, — N.C. App. —, 618 S.E.2d 747, 2005 N.C. App. LEXIS 1914 (2005); *State v. Langley*, — N.C. App. —, 618 S.E.2d 253, 2005 N.C. App. LEXIS 1920 (2005); *Property Rights Advocacy Group v. Town of Long Beach*, — N.C. App. —, 617 S.E.2d 715, 2005 N.C. App. LEXIS 1924 (2005); *State v. Tuck*, — N.C. App. —, 618 S.E.2d 265, 2005 N.C. App. LEXIS 1930

(2005); *In re As.L.G.*, — N.C. App. —, 619 S.E.2d 561, 2005 N.C. App. LEXIS 2116 (2005); *N.C. Dep't of Crime Control & Pub. Safety v. Greene*, — N.C. App. —, 616 S.E.2d 594, 2005 N.C. App. LEXIS 1805 (2005); *State v. Jacobs*, — N.C. App. —, 620 S.E.2d 204, 2005 N.C. App. LEXIS 2279 (2005); *State ex rel. Cooper v. NCCS Loans, Inc.*, — N.C. App. —, 624 S.E.2d 371, 2005 N.C. App. LEXIS 2588 (2005); *State v. Stephens*, — N.C. App. —, 623 S.E.2d 610, 2006 N.C. App. LEXIS 50 (2006); *Am. Gen. Fin. Servs. v. Barnes*, — N.C. App. —, 623 S.E.2d 617, 2006 N.C. App. LEXIS 54 (2006); *State v. Hadden*, — N.C. App. —, 624 S.E.2d 417, 2006 N.C. App. LEXIS 190 (2006).

Rule 30. Oral argument and unpublished opinions.

CASE NOTES

Cited in *Smythe v. Waffle House*, 170 N.C. App. 361, 612 S.E.2d 345, 2005 N.C. App.

LEXIS 999 (2005), cert. denied, 360 N.C. 66, 621 S.E.2d 876 (2005).

Rule 32. Mandates of the courts.

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Applied in *Squire v. Pol*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 37246 (W.D.N.C. Sept. 13, 2005).

Rule 34. Frivolous appeals; Sanctions.

CASE NOTES

Sanctions Imposed. — Order allowing estates to amend their complaint in a medical malpractice suit was not immediately appealable where the issues of a hospital's claim that, without immediate review, it lost the right to avoid trial altogether by (1) raising the statute of limitations, (2) raising "estoppel by laches" as an affirmative defense, or (3) having the

amended complaint dismissed for failure to comply with G.S. 1A-1, N.C. R. Civ. P. 9(j), were not brought before the trial court, and no substantial right was lost by the failure to allow immediate review; the estates were also entitled to sanctions against the hospital. *Estate of Spell v. Ghanem*, — N.C. App. —, 622 S.E.2d 725, 2005 N.C. App. LEXIS 2717 (2005).

Rule 37. Motions in appellate courts.

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I. In General.

I. IN GENERAL.

Applied in *Haley v. ABB, Inc.*, — N.C. App. —, 621 S.E.2d 180, 2005 N.C. App. LEXIS 2496 (2005); *Warren v. Warren*, — N.C. App. —, 623

S.E.2d 800, 2006 N.C. App. LEXIS 139 (2006).

Cited in *Skinner v. Preferred Credit*, — N.C. App. —, 616 S.E.2d 676, 2005 N.C. App. LEXIS 1806 (2005).

Rule 41. Appeal information statement.**CASE NOTES**

Review of significant issues warranted under N.C. R. App. P. 2. — Since a plaintiff's violations of N.C. R. App. P. 26(g), 28(b)(5)-(6), 28(d)(1)(c), and 41(b)(2) were not so egregious as to invoke dismissal, the appeals court elected to review the significant issues of the

employee's appeal of a summary judgment dismissing her wrongful termination/discrimination claims pursuant to N.C. R. App. P. 2. *Youse v. Duke Energy Corp.*, 171 N.C. App. 187, 614 S.E.2d 396, 2005 N.C. App. LEXIS 1209 (2005).

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PERSONAL IDENTIFYING INFORMATION.

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Because a judge sexually harassed a judicial assistant and a paralegal, pursuant to G.S. 7A-376, G.S. 7A-377, and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, the judge was censured for conduct prejudicial to the

administration of justice and violation of the judge's oath of office under G.S. 7A-376, N.C. Code Jud. Conduct 1, N.C. Code Jud. Conduct 2(A), and N.C. Code Jud. Conduct 3(A)(3). In re Inquiry Concerning Daisy, 359 N.C. 622, 614 S.E.2d 529, 2005 N.C. LEXIS 636 (2005).

CODE OF JUDICIAL CONDUCT

Adopted September 26, 1973,
with amendments received through January 31, 2006.

Preamble

Canon

1. A judge should uphold the integrity and independence of the judiciary.
2. A judge should avoid impropriety in all his activities.
3. A judge should perform the duties of the judge's office impartially and diligently.
4. A judge may participate in cultural or historical activities or engage in activities concerning the legal, economic, educational, or governmental system, or the administration of justice.

Canon

5. A judge should regulate the judge's extra-judicial activities to ensure that they do not prevent the judge from carrying out the judge's judicial duties.
6. A judge should regularly file reports of compensation received for quasi-judicial and extra-judicial activities.
7. A judge may engage in political activity consistent with the judge's status as a public official.

Limitation of Proceedings

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PREAMBLE

An independent and honorable judiciary is indispensable to justice in our society, and to this end and in furtherance thereof, this Code of Judicial Conduct is hereby established. A violation of this Code of Judicial Conduct may be deemed conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or willful misconduct in office, or otherwise as grounds for disciplinary proceedings pursuant to Article 30 of Chapter 7A of the General Statutes of North Carolina. No other code or proposed code of judicial conduct shall be relied upon in the interpretation and application of this Code of Judicial Conduct. (Amended effective April 2, 2003.)

Canon 1. A judge should uphold the integrity and independence of the judiciary.

A judge should participate in establishing, maintaining, and enforcing, and should personally observe, appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved. (Amended effective April 2, 2003; amended effective January 31, 2006.)

CASE NOTES

Sexual harassment. — Because a judge sexually harassed a judicial assistant and a paralegal, pursuant to G.S. 7A-376, G.S. 7A-377, and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, the judge was censured for conduct prejudicial to the administra-

tion of justice and violation of the judge's oath of office under G.S. 7A-376, N.C. Code Jud. Conduct 1, N.C. Code Jud. Conduct 2(A), and N.C. Code Jud. Conduct 3(A)(3). In re Inquiry Concerning Daisy, 359 N.C. 622, 614 S.E.2d 529, 2005 N.C. LEXIS 636 (2005).

Canon 2. A judge should avoid impropriety in all his activities.

A. A judge should respect and comply with the law and should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow the judge's family, social or other relationships to influence the judge's judicial conduct or judgment. The judge should not lend

the prestige of the judge's office to advance the private interest of others; nor should the judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge may, based on personal knowledge, serve as a personal reference or provide a letter of recommendation. A judge should not testify voluntarily as a character witness.

C. A judge should not hold membership in any organization that practices unlawful discrimination on the basis of race, gender, religion or national origin. (Amended May 25, 1997, effective September 1, 1997; Amended effective April 2, 2003; Amended effective January 31, 2006.)

CASE NOTES

Sexual Harassment — Because a judge sexually harassed a judicial assistant and a paralegal, pursuant to G.S. 7A-376, G.S. 7A-377, and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, the judge was censured for conduct prejudicial to the administra-

tion of justice and violation of the judge's oath of office under G.S. 7A-376, N.C. Code Jud. Conduct 1, N.C. Code Jud. Conduct 2(A), and N.C. Code Jud. Conduct 3(A)(3). In re Inquiry Concerning Daisy, 359 N.C. 622, 614 S.E.2d 529, 2005 N.C. LEXIS 636 (2005).

Canon 3. A judge should perform the duties of the judge's office impartially and diligently.

The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

A. Adjudicative responsibilities.

(1) A judge should be faithful to the law and maintain professional competence in it. A judge should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before the judge.

(3) A judge should be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in the judge's official capacity, and should require similar conduct of lawyers, and of the judge's staff, court officials and others subject to the judge's direction and control.

(4) A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither knowingly initiate nor knowingly consider *ex parte* or other communications concerning a pending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should abstain from public comment about the merits of a pending proceeding in any state or federal court dealing with a case or controversy arising in North Carolina or addressing North Carolina law and should encourage similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit a judge from making public statements in the course of official duties; from explaining for public information the proceedings of the Court; from addressing or discussing previously issued judicial decisions when serving as faculty or otherwise participating in educational courses or programs; or from addressing educational, religious, charitable, fraternal, political, or civic organizations.

(7) A judge should exercise discretion with regard to permitting broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during civil or criminal sessions of court or

recesses between sessions, pursuant to the provisions of Rule 15 of the General Rules of Practice for the Superior and District Courts.

B. Administrative responsibilities.

(1) A judge should diligently discharge the judge's administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge should require the judge's staff and court officials subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge.

(3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

(4) A judge should not make unnecessary appointments. A judge should exercise the judge's power of appointment only on the basis of merit, avoiding nepotism and favoritism. A judge should not approve compensation of appointees beyond the fair value of services rendered.

C. Disqualification.

(1) On motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned, including but not limited to instances where:

(a) The judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings;

(b) The judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) The judge knows that he/she, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge should inform himself/herself about the judge's personal and fiduciary financial interests, and make a reasonable effort to inform himself/herself about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

(3) For the purposes of this section:

(a) The degree of relationship is calculated according to the civil law system;

(b) "Fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "Financial interest" means ownership of a substantial legal or equitable interest (i.e., an interest that would be significantly affected in value by the outcome of the subject legal proceeding), or a relationship as director or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, cultural, historical, religious, charitable, fraternal or civic organization is not a "financial interest" in securities held by the organization.

D. Remittal of disqualification.

Nothing in this Canon shall preclude a judge from disqualifying himself/herself from participating in any proceeding upon the judge's own initiative. Also, a judge potentially disqualified by the terms of Canon 3C may, instead of withdrawing from the proceeding, disclose on the record the basis of the judge's potential disqualification. If, based on such disclosure, the parties and lawyers, on behalf of their clients and independently of the judge's participation, all agree in writing that the judge's basis for potential disqualification is immaterial or insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all lawyers, shall be incorporated in the record of the proceeding. For purposes of this section, *pro se* parties shall be considered lawyers. (Amended June 13, 1990; Amended May 25, 1997, effective September 1, 1997; Amended effective April 2, 2003; Amended effective January 31, 2006.)

CASE NOTES**Recusal Not Required. —**

Trial judge did not err by denying plaintiff's motion to recuse himself; that the trial judge's daughter had worked for the law firm retained by one of the defendants in a personal injury suit was insufficient to require recusal since the daughter had no involvement with the case, the parties were informed about the matter and had no problem with the situation, and there was no indication that the daughter's employment during the summer at the firm in any way prevented the trial judge from being even-handed and unbiased. Further, the fact that the trial judge urged the parties to settle was not improper and also provided no ground for recusal. *In re Pedestrian Walkway Failure*, —

N.C. App. —, 618 S.E.2d 819, 2005 N.C. App. LEXIS 2032 (2005).

Sexual Harassment. — Because a judge sexually harassed a judicial assistant and a paralegal, pursuant to G.S. 7A-376, G.S. 7A-377, and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, the judge was censured for conduct prejudicial to the administration of justice and violation of the judge's oath of office under G.S. 7A-376, N.C. Code Jud. Conduct 1, N.C. Code Jud. Conduct 2(A), and N.C. Code Jud. Conduct 3(A)(3). *In re Inquiry Concerning Daisy*, 359 N.C. 622, 614 S.E.2d 529, 2005 N.C. LEXIS 636 (2005).

Canon 4. A judge may participate in cultural or historical activities or engage in activities concerning the legal, economic, educational, or governmental system, or the administration of justice.

A judge, subject to the proper performance of the judge's judicial duties, may engage in the following quasi-judicial activities, if in doing so the judge does not cast substantial doubt on the judge's capacity to decide impartially any issue that may come before the judge:

A. A judge may speak, write, lecture, teach, participate in cultural or historical activities, or otherwise engage in activities concerning the economic, educational, legal, or governmental system, or the administration of justice.

B. A judge may appear at a public hearing before an executive or legislative body or official with respect to activities permitted under Canon 4A or other provision of this Code, and the judge may otherwise consult with an executive or legislative body or official.

C. A judge may serve as a member, officer or director of an organization or governmental agency concerning the activities described in Canon 4A, and may participate in its management and investment decisions. A judge may not actively assist such an organization in raising funds but may be listed as a contributor on a fund-raising invitation. A judge may make recommendations to public and private fund-granting agencies regarding activities or projects undertaken by such an organization. (Amended effective April 2, 2003; Amended effective January 31, 2006.)

Canon 5. A judge should regulate the judge's extra-judicial activities to ensure that they do not prevent the judge from carrying out the judge's judicial duties.

A. *Avocational activities.* A judge may write, lecture, teach, and speak on legal or non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not substantially interfere with the performance of the judge's judicial duties.

B. *Civic and charitable activities.* A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of the judge's judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal or civic organization subject to the following limitations.

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge.

(2) A judge may be listed as an officer, director or trustee of any cultural, educational, historical, religious, charitable, fraternal or civic organization. A judge may not actively assist such an organization in raising funds but may be listed as a contributor on a fund-raising invitation.

(3) A judge may serve on the board of directors or board of trustees of such an organization even though the board has the responsibility for approving investment decisions.

C. *Financial activities.*

(1) A judge should refrain from financial and business dealings that reflect adversely on the judge's impartiality, interfere with the proper performance of the judge's judicial duties, exploit the judge's judicial position or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves.

(2) Subject to the requirements of subsection (1), a judge may hold and manage the judge's own personal investments or those of the judge's spouse, children, or parents, including real estate investments, and may engage in other remunerative activity not otherwise inconsistent with the provisions of this Code but should not serve as an officer, director or manager of any business.

(3) A judge should manage his/her investments and other financial interests to minimize the number of cases in which the judge is disqualified.

(4) Neither a judge nor a member of the judge's family residing in the judge's household should accept a gift from anyone except as follows:

(a) A judge may accept a gift incident to a public testimonial to the judge; books supplied by publishers on a complimentary basis for official or academic use; or an invitation to the judge and the judge's spouse to attend a bar-related function, a cultural or historical activity, or an event related to the economic, educational, legal, or governmental system, or the administration of justice;

(b) A judge or a member of the judge's family residing in the judge's household may accept ordinary social hospitality; a gift, favor or loan from a friend or relative; a wedding, engagement or other special occasion gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) Other than as permitted under subsection C.(4)(b) of this Canon, a judge or a member of the judge's family residing in the judge's household may accept any other gift only if the donor is not a party presently before the judge and, if its value exceeds \$500, the judge reports it in the same manner as the judge reports compensation in Canon 6C.

(5) For the purposes of this section "member of the judge's family residing in the judge's household" means any relative of a judge by blood or marriage, or

a person treated by a judge as a member of the judge's family, who resides in the judge's household.

(6) A judge is not required by this Code to disclose his/her income, debts or investments, except as provided in this Canon and Canons 3 and 6.

(7) Information acquired by a judge in the judge's judicial capacity should not be used or disclosed by the judge in financial dealings or for any other purpose not related to the judge's judicial duties.

D. *Fiduciary activities.* A judge should not serve as the executor, administrator, trustee, guardian or other fiduciary, except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of the judge's judicial duties. "Member of the judge's family" includes a spouse, child, grandchild, parent, grandparent or any other relative of the judge by blood or marriage. As a family fiduciary a judge is subject to the following restrictions:

(1) A judge should not serve if it is likely that as a fiduciary the judge will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversarial proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(2) While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to the judge in his/her personal capacity.

E. *Arbitration.* A judge should not act as an arbitrator or mediator. However, an emergency justice or judge of the Appellate Division designated as such pursuant to Article 6 of Chapter 7A of the General Statutes of North Carolina, and an Emergency Judge of the District Court or Superior Court commissioned as such pursuant to Article 8 of Chapter 7A of the General Statutes of North Carolina may serve as an arbitrator or mediator when such service does not conflict with or interfere with the justice's or judge's judicial service in emergency status. A judge of the Appellate Division may participate in any dispute resolution program conducted at the Court of Appeals and authorized by the Supreme Court.

F. *Practice of law.* A judge should not practice law.

G. *Extra-judicial appointments.* A judge should not accept appointment to a committee, commission, or other body concerned with issues of fact or policy on matters other than those relating to cultural or historical matters, the economic, educational, legal or governmental system, or the administration of justice. A judge may represent his/her country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities. (Amended effective April 2, 2003; Amended effective January 31, 2006.)

Canon 6. A judge should regularly file reports of compensation received for quasi-judicial and extra-judicial activities.

A judge may receive compensation, honoraria and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, subject to the following restrictions:

A. *Compensation and honoraria.* Compensation and honoraria should not exceed a reasonable amount.

B. *Expense reimbursement.* Expense reimbursement should be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse. Any payment in excess of such an amount is compensation.

C. *Public reports.* A judge shall report the name and nature of any source or activity from which the judge received more than \$2,000 in income during the calendar year for which the report is filed. Any required report shall be made annually and filed as a public document as follows: The members of the Supreme Court shall file such reports with the Clerk of the Supreme Court; the

members of the Court of Appeals shall file such reports with the Clerk of the Court of Appeals; and each Superior Court Judge, regular, special, and emergency, and each District Court Judge, shall file such report with the Clerk of the Superior Court of the county in which the judge resides. For each calendar year, such report shall be filed, absent good cause shown, not later than May 15th of the following year. (Amended December 30, 1974; Amended November 3, 1983; Amended effective April 2, 2003; Amended effective January 31, 2006.)

Canon 7. A judge may engage in political activity consistent with the judge's status as a public official.

The provisions of Canon 7 are designed to strike a balance between two important but competing considerations: (1) the need for an impartial and independent judiciary and (2) in light of the continued requirement that judicial candidates run in public elections as mandated by the Constitution and laws of North Carolina, the right of judicial candidates to engage in constitutionally protected political activity. To promote clarity and to avoid potentially unfair application of the provisions of this Code, subsection B of Canon 7 establishes a safe harbor of permissible political conduct.

A. *Terminology.* For the purposes of this Canon only, the following definitions apply.

(1) A "candidate" is a person actively and publicly seeking election to judicial office. A person becomes a candidate for judicial office as soon as the person makes a public declaration of candidacy, declares or files as a candidate with the appropriate election authority, authorizes solicitation or acceptance of contributions or public support, or sends a letter of intent to the chair of the Judicial Standards Commission. The term "candidate" has the same meaning when applied to a judge seeking election to a non-judicial office.

(2) To "solicit" means to directly, knowingly and intentionally make a request, appeal or announcement, public or private, oral or written, whether in person or through the press, radio, television, telephone, Internet, billboard, or distribution and circulation of printed materials, that expressly requests other persons to contribute, give, loan or pledge any money, goods, labor, services or real property interest to a specific individual's efforts to be elected to public office.

(3) To "endorse" means to knowingly and expressly request, appeal or announce publicly, orally or in writing, whether in person or through the press, radio, television, telephone, Internet, billboard or distribution and circulation of printed materials, that other persons should support a specific individual in that person's efforts to be elected to public office.

B. *Permissible political conduct.* A judge or a candidate may:

(1) attend, preside over, and speak at any political party gathering, meeting or other convocation, including a fund-raising function for himself/herself, another individual or group of individuals seeking election to office and the judge or candidate may be listed or noted within any publicity relating to such an event, so long as he/she does not expressly endorse a candidate (other than himself/herself) for a specific office or expressly solicit funds from the audience during the event;

(2) if a judge is a candidate, endorse any individual seeking election to any office or conduct a joint campaign with and endorse other individuals seeking election to judicial office, including the solicitation of funds for a joint judicial campaign;

(3) identify himself/herself as a member of a political party and make financial contributions to a political party or organization; provided, however, that he/she may not personally make financial contributions or loans to any

individual seeking election to office (other than himself/herself) except as part of a joint judicial campaign as permitted in subsection B(2);

(4) personally solicit campaign funds and request public support from anyone for his/her own campaign or, alternatively, and in addition thereto, authorize or establish committees of responsible persons to secure and manage the solicitation and expenditure of campaign funds;

(5) become a candidate either in a primary or in a general election for a judicial office provided that the judge should resign the judge's judicial office prior to becoming a candidate either in a party primary or in a general election for a non-judicial office;

(6) engage in any other constitutionally protected political activity.

C. *Prohibited political conduct.* A judge or a candidate should not:

(1) solicit funds on behalf of a political party, organization, or an individual (other than himself/herself) seeking election to office, by specifically asking for such contributions in person, by telephone, by electronic media, or by signing a letter, except as permitted under subsection B of this Canon or otherwise within this Code;

(2) endorse a candidate for public office except as permitted under subsection B of this Canon or otherwise within this Code;

(3) intentionally and knowingly misrepresent his/her identity or qualifications.

D. *Political conduct of family members.* The spouse or other family member of a judge or a candidate is permitted to engage in political activity. (Amended December 30, 1974; further amended March 16, 1976; further amended May 25, 1997, effective September 1, 1997; further amended February 17, 1998; further amended effective April 2, 2003; further amended effective January 31, 2006.)

LIMITATION OF PROCEEDINGS

Disciplinary proceedings to redress alleged violations of Canon 7 of this Code must be commenced within three months of the act or omission allegedly giving rise to the violation. Disciplinary proceedings to redress alleged violations of all other provisions of this Code must be commenced within three years of the act or omission allegedly giving rise to the violation; provided, however, that disciplinary proceedings may be instituted at anytime against a judge convicted of a felony during the judge's tenure in judicial office.

SCOPE AND EFFECTIVE DATE OF COMPLIANCE

The provisions of Canon 7 of this Code shall apply to judges and candidates for judicial office. The other provisions of this Code shall become effective as to a judge upon the administration of the judge's oath to the office of judge; provided, however, that it shall be permissible for a newly installed judge to facilitate or assist in the transfer of the judge's prior duties as legal counsel but the judge may not be compensated therefor. (Amended effective April 2, 2003; further amended effective January 31, 2006.)

RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR

With amendments effective March 2, 2006.

Section .0100. Discipline and Disability of Attorneys

Rule

- B.0114. Formal hearing.
- B.0117. Surrender of license while under investigation.

Section .0900. Procedures for the Administrative Committee

- D.0902. Reinstatement from inactive status.
- D.0903. Suspension for non-payment of membership fee, late fee, client security fund assessment, or assessed costs, or failure to file certificate of insurance coverage or *pro hac vice* registration statement.
- D.0904. Reinstatement after suspension for failure to pay fees or assessed costs, or to file certificate of insurance coverage or *pro hac vice* registration statement.

Section .1500. Rules Governing the Administration of the Continuing Legal Education Program

- D.1501. Scope, purpose and definitions.
- D.1517. Exemptions.
- D.1520. Accreditation of sponsors and programs.
- D.1522. Annual report and Compliance Period.
- D.1524. Reinstatement.

Section .1600. Regulations Governing the Administration of the Continuing Legal Education Program

- D.1601. General Requirements for Course Approval.
- D.1602. General course requirements.
- D.1604. Accreditation of Prerecorded Simultaneous Broadcast, and Computer-Based Programs.

Section .1700. The Plan of Legal Specialization

Rule

- D.1720. Minimum standards for certification of specialists.

Section .2800. Certification Standards for the Social Security Disability Law Specialty

- D.2801. Establishment of specialty field.
- D.2802. Definition of Specialty.
- D.2803. Recognition as a Specialist in Social Security Disability Law.
- D.2804. Applicability of provisions of the North Carolina Plan of Legal Specialization.
- D.2805. Standards for certification as a Specialist in Social Security Disability Law.
- D.2806. Standards for continued certification as a specialist.
- D.2807. Applicability of other requirements.

Section .0100. The Plan for Certification of Paralegals

- G.0104. Size and Composition of Board.
- G.0115. Powers and Duties of the Board.
- G.0118. Certification Committee.
- G.0119. Standards for Certification of Paralegals.

Section .0200. Rules Governing Continuing Paralegal Education. Rule

- G.0202. Accreditation Standards.

Section .0100. Registration Procedure

- H.0100. Registration.

Index follows Rules.

SECTION .0100. DISCIPLINE AND DISABILITY OF ATTORNEYS

B.0114. Formal hearing.

(a) Complaints will be filed with the secretary. The secretary will cause a summons and a copy of the complaint to be served upon the defendant and thereafter a copy of the complaint will be delivered to the chairperson of the commission, informing the chairperson of the date service on the defendant was effected.

(b) Service of complaints and summonses and other documents or papers will be accomplished as set forth in the North Carolina Rules of Civil Procedure.

(c) Complaints in disciplinary actions will allege the charges with sufficient precision to clearly apprise the defendant of the conduct which is the subject of the complaint.

(d) Within 20 days of the receipt of return of service of a complaint by the secretary, the chairperson of the commission will designate a hearing committee from among the commission members. The chairperson will notify the counsel and the defendant of the composition of the hearing committee. Such notice will also contain the time and place determined by the chairperson for the hearing to commence. The commencement of the hearing will be initially scheduled not less than 90 nor more than 150 days from the date of service of the complaint upon the defendant, unless one or more subsequent complaints have been served on the defendant within 90 days from the date of service of the first or a preceding complaint. When one or more subsequent complaints have been served on the defendant within 90 days from the date of service of the first or a preceding complaint, the chairperson of the commission may consolidate the cases for hearing, and the hearing will be initially scheduled not less than 90 nor more than 150 days from the date of service of the last complaint upon the defendant. By agreement between the parties and with the consent of the chair, the date for the initial setting of the hearing may be set less than 90 days after the date of service on the defendant.

(e) Within 20 days after the service of the complaint, unless further time is allowed by the chairperson of the hearing committee upon good cause shown, the defendant will file an answer to the complaint with the secretary and will serve a copy on the counsel.

(f) Failure to file an answer admitting, denying or explaining the complaint or asserting the grounds for failing to do so, within the time limited or extended, will be grounds for entry of the defendant's default and in such case the allegations contained in the complaint will be deemed admitted. The secretary will enter the defendant's default when the fact of default is made to appear by motion of the counsel or otherwise. The counsel may thereupon apply to the hearing committee for a default order imposing discipline, and the hearing committee will thereupon enter an order, make findings of fact and conclusions of law based on the admissions, and order the discipline deemed appropriate. The hearing committee may, in its discretion, hear such additional evidence as it deems necessary prior to entering the order of discipline. For good cause shown, the hearing committee may set aside the secretary's entry of default. After an order imposing discipline has been entered by the hearing committee upon the defendant's default, the hearing committee may set aside the order in accordance with Rule 60(b) of the North Carolina Rules of Civil Procedure.

(g) Discovery will be available to the parties in accordance with the North Carolina Rules of Civil Procedure. Any discovery undertaken must be completed before the date scheduled for commencement of the hearing unless the time for discovery is extended for good cause shown by the chairperson of the hearing committee. The chairperson of the hearing committee may thereupon reset the time for the hearing to commence to accommodate completion of reasonable discovery.

(h) The parties may meet by mutual consent prior to the hearing on the complaint to discuss the possibility of settlement of the case or the stipulation of any issues, facts, or matters of law. Any proposed settlement of the case will be subject to the approval of the hearing committee. If the committee rejects a proposed settlement, another hearing committee must be empaneled to try the case, unless all parties consent to proceed with the original committee. The

parties may submit a proposed settlement to a second hearing committee, but the parties shall not have the right to request a third hearing committee if the settlement order is rejected by the second hearing committee. The second hearing committee shall either accept the settlement proposal or hear the disciplinary matter.

(i) At the discretion of the chairperson of the hearing committee, and upon five days' notice to the parties, a conference may be ordered before the date set for commencement of the hearing for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. Such conference may be held before any member of the committee designated by its chairperson who shall have the power to issue such orders as may be appropriate. At any conference which may be held to expedite the orderly conduct and disposition of any hearing, there may be considered, in addition to any offers of settlement or proposals of adjustment the following:

- (1) the simplification of the issues;
- (2) the exchange of exhibits proposed to be offered in evidence;
- (3) the stipulation of facts not remaining in dispute or the authenticity of documents;
- (4) the limitation of the number of witnesses;
- (5) the discovery or production of data;
- (6) such other matters as may properly be dealt with to aid in expediting the orderly conduct and disposition of the proceeding.

The Chairperson may impose sanctions as set out in Rule 37(b) of the N.C. Rules of Civil Procedure against any party who willfully fails to comply with a prehearing order issued pursuant to this section.

(j) The chairperson of the hearing committee, without consulting the other committee members, may hear and dispose of all pretrial motions except motions the granting of which would result in dismissal of the charges or final judgment for either party. All motions which could result in dismissal of the charges or final judgment for either party will be decided by a majority of the members of the hearing committee. Any pretrial motion may be decided on the basis of the parties' written submissions. Oral argument may be allowed in the discretion of the chairperson of the hearing committee.

(k) The initial hearing date as set by the chairperson in accordance with Rule .0114(d) above may be reset by the chairperson, and said initial hearing or reset hearing may be continued by the chairperson of the hearing committee for good cause shown.

(l) After a hearing has commenced, no continuances other than an adjournment from day to day will be granted, except to await the filing of a controlling decision of an appellate court, by consent of all parties, or where extreme hardship would result in the absence of a continuance.

(m) The defendant will appear in person before the hearing committee at the time and place named by the chairperson. The hearing will be open to the public except that for good cause shown the chairperson of the hearing committee may exclude from the hearing room all persons except the parties, counsel, and those engaged in the hearing. No hearing will be closed to the public over the objection of the defendant. The defendant will, except as otherwise provided by law, be competent and compellable to give evidence for either of the parties. The defendant may be represented by counsel, who will enter an appearance.

(n) Pleadings and proceedings before a hearing committee will conform as nearly as practicable with requirements of the North Carolina Rules of Civil Procedure and for trials of nonjury civil causes in the superior courts except as otherwise provided herein.

(o) Pleadings or other documents in formal proceedings required or permitted to be filed under these rules must be received for filing by the secretary

within the time limits, if any, for such filing. The date of receipt by the secretary, and not the date of deposit in the mails, is determinative.

(p) All papers presented to the commission for filing will be on letter size paper (8 1/2 x 11 inches) with the exception of exhibits. The secretary will require a party to refile any paper that does not conform to this size.

(q) When a defendant appears in his or her own behalf in a proceeding, the defendant will file with the secretary, with proof of delivery of a copy to the counsel, an address at which any notice or other written communication required to be served upon the defendant may be sent, if such address differs from that last reported to the secretary by the defendant.

(r) When a defendant is represented by counsel in a proceeding, counsel will file with the secretary, with proof of delivery of a copy to the counsel, a written notice of such appearance which will state his or her name, address and telephone number, the name and address of the defendant on whose behalf he or she appears, and the caption and docket number of the proceeding. Any additional notice or other written communication required to be served on or furnished to a defendant during the pendency of the hearing may be sent to the counsel of record for such defendant at the stated address of the counsel in lieu of transmission to the defendant.

(s) The hearing committee will have the power to subpoena witnesses and compel their attendance, and to compel the production of books, papers, and other documents deemed necessary or material to any hearing. Such process will be issued in the name of the committee by its chairperson, or the chairperson may designate the secretary of the North Carolina State Bar to issue such process. Both parties have the right to invoke the powers of the committee with respect to compulsory process for witnesses and for the production of books, papers, and other writings and documents.

(t) In any hearing admissibility of evidence will be governed by the rules of evidence applicable in the superior court of the state at the time of the hearing. The chairperson of the hearing committee will rule on the admissibility of evidence, subject to the right of any member of the hearing committee to question the ruling. If a member of the hearing committee challenges a ruling relating to admissibility of evidence, the question will be decided by majority vote of the hearing committee.

(u) If the hearing committee finds that the charges of misconduct are not established by clear, cogent, and convincing evidence, it will enter an order dismissing the complaint. If the hearing committee finds that the charges of misconduct are established by clear, cogent, and convincing evidence, the hearing committee will enter an order of discipline. In either instance, the committee will file an order which will include the committee's findings of fact and conclusions of law.

(v) The secretary will ensure that a complete record is made of the evidence received during the course of all hearings before the commission as provided by G.S. 7A-95 for trials in the superior court. The secretary will preserve the record and the pleadings, exhibits, and briefs of the parties.

(w) If the charges of misconduct are established, the hearing committee will then consider any evidence relevant to the discipline to be imposed, including the record of all previous misconduct for which the defendant has been disciplined in this state or any other jurisdiction and any evidence in aggravation or mitigation of the offense.

(1) The hearing committee may consider aggravating factors in imposing discipline in any disciplinary case, including the following factors:

- (A) prior disciplinary offenses;
- (B) dishonest or selfish motive;
- (C) a pattern of misconduct;
- (D) multiple offenses;

(E) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency;

(F) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;

(G) refusal to acknowledge wrongful nature of conduct;

(H) vulnerability of victim;

(I) substantial experience in the practice of law;

(J) indifference to making restitution;

(K) issuance of a letter of warning to the defendant within the three years immediately preceding the filing of the complaint.

(2) The hearing committee may consider mitigating factors in imposing discipline in any disciplinary case, including the following factors:

(A) absence of a prior disciplinary record;

(B) absence of a dishonest or selfish motive;

(C) personal or emotional problems;

(D) timely good faith efforts to make restitution or to rectify consequences of misconduct;

(E) full and free disclosure to the hearing committee or cooperative attitude toward proceedings;

(F) inexperience in the practice of law;

(G) character or reputation;

(H) physical or mental disability or impairment;

(I) delay in disciplinary proceedings through no fault of the defendant attorney;

(J) interim rehabilitation;

(K) imposition of other penalties or sanctions;

(L) remorse;

(M) remoteness of prior offenses.

(x) In any case in which a period of suspension is stayed upon compliance by the defendant with conditions, the commission will retain jurisdiction of the matter until all conditions are satisfied. If, during the period the stay is in effect, the counsel receives information tending to show that a condition has been violated, the counsel may, with the consent of the chairperson of the Grievance Committee, file a motion in the cause with the secretary specifying the violation and seeking an order requiring the defendant to show cause why the stay should not be lifted and the suspension activated for violation of the condition. The counsel will also serve a copy of any such motion upon the defendant. The secretary will promptly transmit the motion to the chairperson of the commission who, if he or she enters an order to show cause, will appoint a hearing committee as provided in Rule .0108(a)(2) of this subchapter, appointing the members of the hearing committee that originally heard the matter wherever practicable. The chairperson of the commission will also schedule a time and a place for a hearing and notify the counsel and the defendant of the composition of the hearing committee and the time and place for the hearing. After such a hearing, the hearing committee may enter an order lifting the stay and activating the suspension, or any portion thereof, and taxing the defendant with the costs, if it finds that the North Carolina State Bar has proven, by the greater weight of the evidence, that the defendant has violated a condition. If the hearing committee finds that the North Carolina State Bar has not carried its burden, then it will enter an order continuing the stay. In any event, the hearing committee will include in its order findings of fact and conclusions of law in support of its decision.

(y) All reports and orders of the hearing committee will be signed by the members of the committee, or by the chairperson of the committee on behalf of the committee, and will be filed with the secretary. The copy to the defendant will be served by certified mail, return receipt requested or personal service. A

defendant who cannot, with due diligence, be served by certified mail or personal service shall be deemed served by the mailing of a copy of the order to the defendant's last known address on file with the N.C. State Bar. Service by mail shall be deemed complete upon deposit of the report or order enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(z) Posttrial Motions

(1) Consent Orders After Trial — At any time after a disciplinary hearing and prior to the execution of the committee's final order pursuant to Rule .0114(y) above, the committee may, with the consent of the parties, amend its decision regarding the findings of fact, conclusions of law, or the disciplinary sanction imposed.

(2) New Trials and Amendment of Judgments

(A) As provided in Rule .0114(z)(2)(B) below, following a disciplinary hearing before the commission, either party may request a new trial or amendment of the hearing committee's final order, based on any of the grounds set out in Rule 59 of the North Carolina Rules of Civil Procedure.

(B) A motion for a new trial or amendment of judgment will be served, in writing, on the chairperson of the hearing committee which heard the disciplinary case no later than 20 days after service of the final order upon the defendant. Supporting affidavits, if any, and a memorandum setting forth the basis of the motion together with supporting authorities, will be filed with the motion.

(C) The opposing party will have 20 days from service of the motion to file a written response, any reply affidavits, and a memorandum with supporting authorities.

(D) The hearing committee may rule on the motion based on the parties' written submissions or may, in its discretion, permit the parties to present oral argument.

(3) Relief from Judgment or Order

(A) Following a disciplinary proceeding before the commission, either party may file a motion for relief from the final judgment or order, based on any of the grounds set out in Rule 60 of the North Carolina Rules of Civil Procedure.

(B) Motions made under Rule .0114(z)(2)(B) above will be made no later than one year after the effective date of the order from which relief is sought. Motions pursuant to this section will be heard and decided in the same manner as motions submitted pursuant to Rule .0114(z)(2) above.

(4) Effect of Filing Motion — The filing of a motion under Rule .0114(z)(2) above or Rule .0114(z)(3) above will not automatically stay or otherwise affect the effective date of an order of the commission.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28; G.S. 84-28.1; G.S. 84-29; G.S. 84-30; G.S. 84-32(a), Readopted Effective December 8, 1994; Amended effective October 2, 1997; Amended effective December 30, 1998; Amended effective March 2, 2006.

B.0117. Surrender of license while under investigation.

(a) A member who is the subject of an investigation into allegations of misconduct, but against whom no formal complaint has been filed before the commission may tender his or her license to practice by delivering to the secretary for transmittal to the council an affidavit stating that the member desires to resign and that

(1) the resignation is freely and voluntarily rendered, is not the result of coercion or duress, and the member is fully aware of the implications of submitting the resignation;

(2) the member is aware that there is presently pending an investigation or other proceedings regarding allegations that the member has been guilty of misconduct, the nature of which will specifically be set forth;

(3) the member acknowledges that the material facts upon which the grievance is predicated are true;

(4) the resignation is being submitted because the member knows that if charges were predicated upon the misconduct under investigation, the member could not successfully defend against them.

(b) The council may accept a member's resignation only if the affidavit required under Rule .0117(a) above satisfies the requirements stated therein and the member has provided to the North Carolina State Bar all documents and financial records required to be kept pursuant to the Rules of Professional Conduct and requested by the counsel. If the council accepts a member's resignation, it will enter an order disbarring the member. The order of disbarment is effective on the date the council accepts the member's resignation.

(c) The order disbarring the member and the affidavit required under Rule .0117(a) above are matters of public record.

(d) If a defendant against whom a formal complaint has been filed before the commission wishes to consent to disbarment, the defendant may do so by filing an affidavit with the chairperson of the commission. If the chairperson determines that the affidavit meets the requirements set out in .0117(a)(1), (2), (3), and (4) above, the chairperson will accept the surrender and issue an order of disbarment. The order of disbarment becomes effective upon entry of the order with the secretary. If the affidavit does not meet the requirements set out above, the consent to disbarment will not be accepted and the disciplinary complaint will be heard pursuant to Rule .0114 of this subchapter.

(e) After a member tenders his or her license or consents to disbarment under this section the member may not undertake any new legal matters. The member may complete any legal matters which were pending on the date of the tender of the affidavit or consent to disbarment which can be completed within 30 days of the tender or consent. The member has 30 days from the date on which the member tenders the affidavit of surrender or consent to disbarment in which to comply with all of the duties set out in Rule .0124 of this subchapter.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28; G.S. 84-32(b), Readopted Effective December 8, 1994; Amended effective March 2, 2006.

SECTION .0900. PROCEDURES FOR THE ADMINISTRATIVE COMMITTEE

D.0902. Reinstatement from inactive status.

(a) *Eligibility to apply for reinstatement.*

Any member who has been transferred to inactive status may petition the council for an order reinstating the member as an active member of the North Carolina State Bar.

(b) *Contents of reinstatement petition.*

The petition shall set out facts showing the following:

(1) that the member has provided all information requested in an application form prescribed by the council and has signed the form under oath;

(2) unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter, that the member satisfied the minimum continuing legal education requirements, as set forth in Rule .1518 of this subchapter, for the calendar year immediately preceding the year in which the

member was transferred to inactive status, (the "subject year"), including any deficit from a prior year that was carried forward and recorded in the member's CLE record for the subject year;

(3) that the member has the moral qualifications, competency and learning in the law required for admission to practice law in the state of North Carolina, and that the member's resumption of the practice of law within this state will be neither detrimental to the integrity and standing of the Bar or the administration of justice nor subversive of the public interest;

(4) [this provision shall be effective for all members who are transferred to inactive status on or after January 1, 1996] if 2 or more years have elapsed between the date of the entry of the order transferring the member to inactive status and the date the petition is filed with the secretary of the State Bar, that within one year prior to filing the petition, the member completed 15 hours of continuing legal education (CLE) approved by the Board of Continuing Legal Education pursuant to Rule .1519. of this subchapter. Of the required 15 CLE hours, 3 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism; and

(5) that the member has paid all of the following:

(A) a \$125.00 reinstatement fee;

(B) the membership fee and Client Security Fund assessment for the year in which the application is filed;

(C) the annual membership fee, if any, of the member's district bar for the year in which the application is filed and any past due annual membership fees for any district bar with which the member was affiliated prior to transferring to inactive status;

(D) all attendee fees owed the Board of Continuing Legal Education for CLE courses taken to satisfy the requirements of Rule .0902(b)(2) and (4) above;

(E) any costs previously assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission; and/or the secretary or council of the North Carolina State Bar; and

(F) all costs incurred by the North Carolina State Bar in investigating and processing the application for reinstatement.

The reinstatement fee, costs, and any past due district bar annual membership fees shall be retained; however, the State Bar and district bar membership fees assessed for the year in which the application is filed shall be refunded if the petition is denied.

(c) *Service of reinstatement petition.*

The petitioner shall serve the petition on the secretary. The secretary shall transmit a copy of the petition to the members of the Administrative Committee and to the counsel.

(d) *Investigation by counsel.*

The counsel may conduct any necessary investigation regarding the petition and shall advise the members of the Administrative Committee of any findings from such investigation.

(e) *Response by Administrative Committee.*

After any investigation of the petition by the counsel is complete, the Administrative Committee will consider the petition at its next meeting and shall make a recommendation to the council regarding whether the petition should be granted.

(1) *Conditions Precedent to Reinstatement.* Upon a determination that the petitioner has failed to demonstrate competence to return to the practice of law, the committee may require the petitioner to complete a specified number of hours of continuing legal education, which shall be in addition to the requirements set forth in Rule .0902(b)(2) and (4) above, as a condition precedent to the committee's recommendation that the petition be granted,

(2) *Conditions Subsequent to Reinstatement.* Upon a determination that the petitioner is fit to return to the practice of law pursuant to the reasonable

management of his or her substance abuse, addiction, or debilitating mental condition, the committee may recommend to the council that the reinstatement petition be granted with reasonable conditions to which the petitioner consents. Such conditions may include, but are not limited to, an evaluation by a mental health professional approved by the Lawyer Assistance Program (LAP), compliance with the treatment recommendations of the mental health professional, periodic submission of progress reports by the mental health professional to LAP, and waiver of confidentiality relative to diagnosis and treatment by the mental health professional.

(3) *Failure of Conditions Subsequent to Reinstatement.* In the event the petitioner fails to satisfy the conditions of the reinstatement order, the committee shall issue a notice directing the petitioner to show cause, in writing, why the petitioner should not be suspended from the practice of law. Notice shall be served and the right to request a hearing shall be as provided in Rule .0902(f) below. The hearing shall be conducted as provided in Section .1000 of this subchapter provided, however, the burden of proof shall be upon the petitioner to show by clear, cogent, and convincing evidence that he or she has satisfied the conditions of the reinstatement order.

(f) *Hearing upon denial of petition for reinstatement.*

(1) Notice of Council Action and Request for Hearing

If the council denies a petition for reinstatement, the petitioner shall be notified in writing within 14 days after such action. The notice shall be served upon the petitioner pursuant to Rule 4 of the N.C. Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the N.C. Rules of Civil Procedure to serve process.

(2) The petitioner shall have 30 days from the date of service of the notice to file a written request for hearing upon the secretary. The request shall be served upon the secretary pursuant to Rule 4 of the N.C. Rules of Civil Procedure.

(3) Hearing Procedure

The procedure for the hearing shall be as provided in Section .1000 of this subchapter.

History Note: Statutory Authority G.S. 84-16; G.S. 84-23, Readopted effective December 8, 1994; Amended July 21, 1995; Amended March 7, 1996; Amended March 5, 1998; Amended effective March 3, 1999; Amended effective February 3, 2000; Amended effective March 6,

2002; Amended effective February 27, 2003; March 3, 2005.

Editor's note. — This rule has been set out to correct an error appearing in the main volume.

D.0903. Suspension for non-payment of membership fee, late fee, client security fund assessment, or assessed costs, or failure to file certificate of insurance coverage or pro hac vice registration statement.

(a) *Notice of overdue fees, costs, certificate of insurance coverage, or Pro Hac Vice Registration Statement.*

Whenever it appears that a member has failed to comply, in a timely fashion, with the rules regarding payment of the annual membership fee, late fee, the Client Security Fund assessment, and/or any district bar annual membership fee, or that the member has failed to pay, in a timely fashion, the costs of a disciplinary, disability, reinstatement, show cause, or other proceeding of the North Carolina State Bar as required by a notice of the chairperson of the Grievance Committee, an order of the Disciplinary Hearing Commission, or a notice of the secretary or the council of the North Carolina State Bar, or that the member has failed to file, in a timely fashion, a certificate of insurance coverage as required in Rule .0204 of subchapter A of these rules, or a *pro hac*

vice registration statement as required in Rule .0101 of subchapter H of these rules, the secretary shall prepare a written notice

(1) directing the member to show cause, in writing, within 30 days of the date of service of the notice why he or she should not be suspended from the practice of law, and

(2) when appropriate, demanding payment of a \$30 late fee for the failure to pay the annual membership fee to the North Carolina State Bar and/or Client Security Fund assessment in a timely fashion, and/or failure to submit a certificate of insurance coverage in a timely fashion.

(b) *Service of the notice.*

The notice shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

(c) *Entry of order of suspension upon failure to respond to notice to show cause.*

Whenever a member fails to respond in writing within 30 days of the service of the notice to show cause upon the member, and it appears that the member has failed to comply with the rules regarding payment of the annual membership fee, any late fees imposed pursuant to Rule .0203(b) or Rule .0204(c) of subchapter A, the Client Security Fund assessment, and/or any district bar annual membership fee, and/or it appears that the member has failed to pay any costs assessed against the member as required by a notice of the chairperson of the Grievance Committee, an order of the Disciplinary Hearing Commission, and/or a notice of the secretary or council of the North Carolina State Bar, and/or it appears that the member has failed to file a certificate of insurance coverage, and/or a *pro hac vice* registration statement, the council may enter an order suspending the member from the practice of law. The order shall be effective when entered by the council. A copy of the order shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

(d) *Procedure upon submission of a timely response to a notice to show cause.*

(1) *Consideration by Administrative Committee.*

If a member submits a written response to a notice to show cause within 30 days of the service of the notice upon the member, the Administrative Committee shall consider the matter at its next regularly scheduled meeting. The member may personally appear at the meeting and be heard, may be represented by counsel, and may offer witnesses and documents. The counsel may appear at the meeting on behalf of the State Bar and be heard, and may offer witnesses and documents. The burden of proof shall be upon the member to show cause by clear, cogent and convincing evidence why the member should not be suspended from the practice of law for the apparent failure to comply with the rules regarding payment of the annual membership fee, late fee, Client Security Fund assessment, and/or any district bar annual membership fee, and/or the apparent failure to pay costs assessed against the member as required by a notice of the chairperson of the Grievance Committee, an order of the Disciplinary Hearing Commission, and/or a notice of the secretary or council of the North Carolina State Bar, and/or the apparent failure to file a certificate of insurance coverage and/or a *pro hac vice* registration statement.

(2) *Recommendation of Administrative Committee.*

The Administrative Committee shall determine whether the member has shown cause why the member should not be suspended. If the committee determines that the member has failed to show cause, the committee shall recommend to the council that the member be suspended.

(3) *Order of suspension.*

Upon the recommendation of the Administrative Committee, the council may enter an order suspending the member from the practice of law. The order shall be effective when entered by the council. A copy of the order shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

(e) *Late tender of membership fees, assessed costs, or certificate of insurance coverage.*

If a member tenders to the North Carolina State Bar the annual membership fee, the \$30 late fee, Client Security Fund assessment, any district bar annual membership fee, and/or any costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar and/or overdue certificate of insurance coverage and/or the *pro hac vice* registration statement before a suspension order is entered by the council, no order of suspension will be entered.

History Note: Statutory Authority G.S. 84-23; G.S. 84-34, Readopted effective December 8, 1994; Amended December 7, 1995; Amended March 7, 1996; Amended March 5, 1998; Amended effective February 3, 2000; Amended October 1, 2003; Amended March 2, 2006.

D.0904. Reinstatement after suspension for failure to pay fees or assessed costs, or to file certificate of insurance coverage or *pro hac vice* registration statement.

(a) *Reinstatement within 30 days of service of suspension order.*

A member who has been suspended for nonpayment of the annual membership fee, late fee, Client Security Fund assessment, district bar annual membership fee, and/or costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar, and/or failure to file a certificate of insurance coverage as required by Rule .0204 of subchapter A, and/or a *pro hac vice* registration statement as required by Rule .0101 of subchapter H, may petition the secretary for an order of reinstatement of the member's license at any time up to 30 days after service of the suspension order upon the member. The secretary shall enter an order reinstating the member to active status upon receipt of a timely written request and satisfactory showing by the member of certification of insurance coverage, registration of *pro hac vice* admission, and/or payment of the membership fee, late fee, Client Security Fund assessment, district bar annual membership fee, assessed costs, and the costs of the suspension and reinstatement procedure, including the costs of service. Such member shall not be required to file a formal reinstatement petition or pay a \$125 reinstatement fee.

(b) *Reinstatement more than 30 days after service of suspension order.*

At any time more than 30 days after service of an order of suspension on a member, a member who has been suspended for nonpayment of the membership fee, late fee, Client Security Fund assessment, district bar annual membership fee, and/or costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar and/or failure to file a certificate of insurance coverage, and/or file a *pro hac vice* registration statement, may petition the council for an order of reinstatement.

(c) *Contents of reinstatement petition.*

The petition shall set out facts showing the following:

(1) that the member has provided all information requested in a form to be prescribed by the council and has signed the form under oath;

(2) unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter, that the member satisfied the minimum continuing legal education (CLE) requirements, as set forth in Rule .1518 of this subchapter, for the calendar year immediately preceding the year in which the member was suspended (the "subject year"), including any deficit from a prior year that was carried forward and recorded in the member's CLE record for the subject year and if two or more years have elapsed between the effective date of the suspension order and the date upon which the reinstatement petition is filed, that within one year prior to filing the petition, the member completed 15 hours of CLE accredited pursuant to Rule .1519 of this subchapter, including at least 3 hours of instruction in the areas of professional responsibility and/or professionalism;

(3) that the member has the moral qualifications, competency and learning in the law required for admission to practice law in the state of North Carolina, and that the member's resumption of the practice of law will be neither detrimental to the integrity and standing of the Bar or the administration of justice nor subversive of the public interest;

(4) that the member has paid all of the following:

(A) a \$125.00 reinstatement fee;

(B) all membership fees, Client Security Fund assessments, and late fees owed at the time of suspension and owed for the year in which the reinstatement petition is filed;

(C) all district bar annual membership fees owed at the time of suspension;

(D) all attendee fees, fines and penalties owed the Board of Continuing Legal Education at the time of suspension and, attendee fees for CLE courses taken to satisfy the requirements of Rule .0904(c)(2) above;

(E) any costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar; and

(F) all costs incurred by the North Carolina State Bar in suspending the member, including the costs of service, and in investigating and processing the application for reinstatement; and

(5) that the member has filed a certificate of insurance coverage for the current year; and

(6) that the member has filed any overdue *pro hac vice* registration statement for which the member was responsible.

(d) *Procedure for review of reinstatement petition.*

The Procedure for review of reinstatement petition shall be as set forth in Rule .0902(c)-(f) above.

History Note: Statutory Authority G.S. 84-16; G.S. 84-23; G.S. 84-34, Readopted Effective December 8, 1994; Amended July 21, 1995; Amended March 7, 1996; Amended March 5, 1998; Amended effective February 27, 2003; Amended October 1, 2003; Amended March 2, 2006.

SECTION .1500. RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

D.1501. Scope, purpose and definitions.

(a) *Scope.*

Except as provided herein, these rules shall apply to every active member licensed by the North Carolina State Bar.

(b) *Purpose.*

The purpose of these continuing legal education rules is to assist lawyers licensed to practice and practicing law in North Carolina in achieving and maintaining professional competence for the benefit of the public whom they serve. The North Carolina State Bar, under Chapter 84 of the General Statutes of North Carolina, is charged with the responsibility of providing rules of professional conduct and with disciplining attorneys who do not comply with such rules. The Revised Rules of Professional Conduct adopted by the North Carolina State Bar and approved by the Supreme Court of North Carolina require that lawyers adhere to important ethical standards, including that of rendering competent legal services in the representation of their clients.

At a time when all aspects of life and society are changing rapidly or becoming subject to pressures brought about by change, laws and legal principles are also in transition (through additions to the body of law, modifications and amendments) and are increasing in complexity. One cannot render competent legal services without continuous education and training.

The same changes and complexities, as well as the economic orientation of society, result in confusion about the ethical requirements concerning the practice of law and the relationships it creates. The data accumulated in the discipline program of the North Carolina State Bar argue persuasively for the establishment of a formal program for continuing and intensive training in professional responsibility and legal ethics.

It has also become clear that in order to render legal services in a professionally responsible manner, a lawyer must be able to manage his or her law practice competently. Sound management practices enable lawyers to concentrate on their clients' affairs while avoiding the ethical problems which can be caused by disorganization. These rules therefore provide for the administration of a law practice assistance program which is expected to emphasize training in law office management.

It is in response to such considerations that the North Carolina State Bar has adopted these minimum continuing legal education requirements. The purpose of these minimum continuing legal education requirements is the same as the purpose of the Revised Rules of Professional Conduct themselves—to ensure that the public at large is served by lawyers who are competent and maintain high ethical standards.

(c) *Definitions*

(1) "Accredited sponsor" shall mean an organization whose entire continuing legal education program has been accredited by the Board of Continuing Legal Education.

(2) "Active member" shall include any person who is licensed to practice law in the state of North Carolina and who is an active member of the North Carolina State Bar.

(3) "Administrative Committee" shall mean the Administrative Committee of the North Carolina State Bar.

(4) "Approved activity" shall mean a specific, individual legal education activity presented by an accredited sponsor or presented by other than an accredited sponsor if such activity is approved as a legal education activity under these rules by the Board of Continuing Legal Education.

(5) "Board" means the Board of Continuing Legal Education created by these rules.

(6) "Continuing legal education" or "CLE" is any legal, judicial or other educational activity accredited by the board. Generally, CLE will include educational activities designed principally to maintain or advance the professional competence of lawyers and/or to expand an appreciation and understanding of the professional responsibilities of lawyers.

(7) "Council" shall mean the North Carolina State Bar Council.

(8) "Credit hour" means an increment of time of 60 minutes which may be divided into segments of 30 minutes or 15 minutes, but no smaller.

(9) "Inactive member" shall mean a member of the North Carolina State Bar who is on inactive status.

(10) "In-house continuing legal education" shall mean courses or programs offered or conducted by law firms, either individually or in connection with other law firms, corporate legal departments, or similar entities primarily for the education of their members. The board may exempt from this definition those programs which it finds

(A) to be conducted by public or quasi-public organizations or associations for the education of their employees or members;

(B) to be concerned with areas of legal education not generally offered by sponsors of programs attended by lawyers engaged in the private practice of law.

(11) "Law practice assistance program" shall mean a program administered by the board to provide training in the area of law office management.

(12) A "newly admitted active member" is one who becomes an active member of the North Carolina State Bar for the first time, has been reinstated, or has changed from inactive to active status.

(13) "Participatory CLE" shall mean courses or segments of courses that encourage the participation of attendees in the educational experience through, for example, the analysis of hypothetical situations, role playing, mock trials, roundtable discussions, or debates.

(14) "Professional responsibility" shall mean those courses or segments of courses devoted to a) the substance, the underlying rationale, and the practical application of the Revised Rules of Professional Conduct; b) the professional obligations of the attorney to the client, the court, the public, and other lawyers; and c) the effects of substance abuse and chemical dependency, or debilitating mental condition on a lawyer's professional responsibilities. This definition shall be interpreted consistent with the provisions of Rule .1501(c)(4) or (6) above.

(15) "Professionalism" courses are courses or segments of courses devoted to the identification and examination of, and the encouragement of adherence to, non-mandatory aspirational standards of professional conduct which transcend the requirements of the Revised Rules of Professional Conduct. Such courses address principles of competence and dedication to the service of clients, civility, improvement of the justice system, advancement of the rule of law, and service to the community.

(16) "Rules" shall mean the provisions of the continuing legal education rules established by the Supreme Court of North Carolina (Section .1500 of this subchapter).

(17) "Sponsor" is any person or entity presenting or offering to present one or more continuing legal education programs, whether or not an accredited sponsor.

(18) "Year" shall mean calendar year.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711; Readopted effective December 8, 1994; Amended effective March 6, 1997; Amended effective December 30, 1998; Amended effective March 3, 1999; Amended

effective June 7, 2001; March 3, 2005.

Editor's note. — This rule has been set out to correct an error appearing in the main volume.

D.1517. Exemptions.

(a) *Notification of Board.* To qualify for an exemption for a particular calendar year, a member shall notify the board of the exemption in the annual

report for that calendar year sent to the member pursuant to Rule .1522 of this subchapter. All active members who are exempt are encouraged to attend and participate in legal education programs.

(b) *Government Officials and Members of Armed Forces.* The governor, the lieutenant governor, and all members of the council of state, members of the United States Senate, members of the United States House of Representatives, members of the North Carolina General Assembly and members of the United States Armed Forces on full-time active duty are exempt from the requirements of these rules for any calendar year in which they serve some portion thereof in such capacity.

(c) *Judiciary and Clerks.* Members of the state judiciary who are required by virtue of their judicial offices to take an average of twelve (12) or more hours of continuing judicial or other legal education annually and all members of the federal judiciary are exempt from the requirements of these rules for any calendar year in which they serve some portion thereof in such judicial capacities. A full-time law clerk for a member of the federal or state judiciary is exempt from the requirements of these rules for any calendar year in which the clerk serves some portion thereof in such capacity, provided, however, that the exemption shall not exceed two consecutive calendar years and, further provided, that the clerkship begins within one year after the clerk graduates from law school or passes the bar examination for admission to the North Carolina State Bar whichever occurs later.

(d) *Nonresidents.* Any active member residing outside of North Carolina who does not practice in North Carolina and does not represent North Carolina clients on matters governed by North Carolina law shall be exempt from the requirements of these rules.

(e) *Law Teachers.* An exemption from the requirements of these rules shall be given to any active member who does not practice in North Carolina or represent North Carolina clients on matters governed by North Carolina law and who is:

(1) A full-time teacher at the School of Government (formerly the Institute of Government) of the University of North Carolina;

(2) A full-time teacher at a law school in North Carolina that is accredited by the American Bar Association; or

(3) A full-time teacher of law-related courses at a professional school accredited by its respective professional accrediting agency.

(f) *Special Circumstances Exemptions.* The board may exempt an active member from the continuing legal education requirements for a period of not more than one year at a time upon a finding by the board of special circumstances unique to that member constituting undue hardship or other reasonable basis for exemption, or for a longer period upon a finding of a permanent disability.

(g) *Pro Hac Vice Admission.* Nonresident attorneys from other jurisdictions who are temporarily admitted to practice in a particular case or proceeding pursuant to the provisions of G.S. 84-4.1 shall not be subject to the requirements of these rules.

(h) *Senior Status Exemption.* The board may exempt an active member from the continuing legal education requirements if

(1) the member is sixty-five years of age or older and

(2) the member does not render legal advice to or represent a client unless the member associates another active member who assumes responsibility for the advice or representation.

(i) *CLE Record During Exemption Period.* During a calendar year in which the records of the board indicate that an active member is exempt from the requirements of these rules, the board shall not maintain a record of such member's attendance at accredited continuing legal education activities. Upon

the termination of the member's exemption, the member may request carry over credit up to a maximum of twelve (12) credits for any accredited continuing legal education activity attended during the calendar year immediately preceding the year of the termination of the exemption. Appropriate documentation of attendance at such activities will be required by the board.

(j) *Permanent Disability.* Attorneys who have a permanent disability that makes attendance at CLE programs inordinately difficult may file a request for a permanent substitute program in lieu of attendance and shall therein set out continuing legal education plans tailored to their specific interests and physical ability. The board shall review and approve or disapprove such plans on an individual basis and without delay.

(k) *Application for Substitute Compliance and Exemptions.* Other requests for substitute compliance, partial waivers, other exemptions for hardship or extenuating circumstances may be granted by the board on a yearly basis upon written application of the attorney.

(i) *Bar Examiners.* Credit is earned through service as a bar examiner of the North Carolina Board of Law Examiners. The board will award 12 hours of CLE credit for the preparation and grading of a bar examination by a member of the North Carolina Board of Law Examiners.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711; Readopted effective December 8, 1994; Amended effective February 12, 1997; Amended October 1, 2003; March 3, 2005.

Editor's note. — This rule has been set out to correct an error appearing in the main volume.

D.1520. Accreditation of sponsors and programs.

(a) *Accreditation of sponsors.* An organization desiring accreditation as an accredited sponsor of courses, programs, or other continuing legal education activities may apply for accredited sponsor status to the board. The board shall approve a sponsor as an accredited sponsor if it is satisfied that the sponsor's programs have met the standards set forth in Rule .1519 of this subchapter and regulations established by the board.

(b) *Presumptive approval for accredited sponsors.*

(1) Once an organization is approved as an accredited sponsor, the continuing legal education programs sponsored by that organization are presumptively approved for credit and no application must be made to the board for approval. The board may at any time revoke the accreditation of an accredited sponsor for failure to satisfy the requirements of Rule .1512 and Rule .1519 of this subchapter, and for failure to satisfy the Regulations Governing the Administration of the Continuing Legal Education Program set forth in Section .1600 of this subchapter.

(2) The board may evaluate a program presented by an accredited sponsor and, upon a determination that the program does not satisfy the requirements of Rule .1519, notify the accredited sponsor that any presentation of the same program, the date for which was not included in the announcement required by Rule .1520(e) below, is not approved for credit. Such notice shall be sent by the board to the accredited sponsor within 30 days after the receipt of the announcement. The accredited sponsor may request reconsideration of such a decision by submitting a letter of appeal to the board within 15 days of receipt of the notice of disapproval. The decision by the board on an appeal is final.

(c) *Unaccredited sponsor request for program approval.*

(1) Any organization not accredited as an accredited sponsor that desires approval of a course or program shall apply to the board. The board shall adopt regulations to administer the accreditation of such programs consistent with the provisions of Rule .1519 of this subchapter. Applicants denied approval of

a program may request reconsideration of such a decision by submitting a letter of appeal to the board within 15 days of receipt of the notice of disapproval. The decision by the board on an appeal is final.

(2) The board may at any time decline to accredit CLE programs offered by a non-accredited sponsor for a specified period of time, as determined by the board, for failure to comply with the requirements of Rule .1512, Rule .1519 and Section .1600 of this subchapter.

(d) *Member request for program approval.* An active member desiring approval of a course or program that has not otherwise been approved shall apply to the board. The board that shall adopt regulations to administer approval requests consistent with the requirements Rule .1519 of this subchapter. Applicants denied approval of a program may request reconsideration of such a decision by submitting a letter of appeal to the board within 15 days of the receipt of the notice of disapproval. The decision by the board on an appeal is final.

(e) *Program announcements of accredited sponsors.* At least 30 days prior to the presentation of a program, an accredited sponsor shall file an announcement, on a form prescribed by the board, notifying the board of the dates and locations of presentations of the program and the sponsor's calculation of the CLE credit hours for the program.

(f) *Records.* The board may provide by regulation for the accredited sponsor, unaccredited sponsor, or active member for whom a continuing legal education program has been approved to maintain and provide such records as required by the board.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994; Amended effective February 27, 2003; March 3, 2005.

Editor's note. — This rule has been set out to correct an error appearing in the main volume.

D.1522. Annual report and Compliance Period.

(a) *Annual Written Report.* Commencing in 1989, each active member of the North Carolina State Bar shall provide an annual written report to the North Carolina State Bar in such form as the board shall prescribe by regulation concerning compliance with the continuing legal education program for the preceding year or declaring an exemption under Rule .1517 of this subchapter. The annual report form shall be corrected, if necessary, signed by the member, and promptly returned to the State Bar. Upon receipt of a signed annual report form, appropriate adjustments shall be made to the member's continuing legal education record with the State Bar. No further adjustments shall thereafter be made to the member's continuing legal education record unless, on or before July 31 of the year in which the report form is mailed to members, the member shows good cause for adjusting the member's continuing legal education record for the preceding year.

(b) *Compliance Period.* The period for complying with the requirements of Rule .1518 of this subchapter is January 1 to December 31. A member may complete the requirements for the year on or by the last day of February of the succeeding year provided, however, that this additional time shall be considered a grace period and no extensions of this grace period shall be granted. All members are encouraged to complete the requirements within the appropriate calendar year.

(c) *Report.* Prior to January 31 of each year, the prescribed report form concerning compliance with the continuing legal education program for the preceding year shall be mailed to all active members of the North Carolina State Bar.

(d) *Late Filing Penalty.* Any attorney who, for whatever reasons, files the report showing compliance or declaring an exemption after the due date of the last day of February shall pay a \$75.00 late filing penalty. This penalty shall be submitted with the report. A report that is either received by the board or postmarked on or before the due date shall be considered timely filed. An attorney who complies with the requirements of the rules during the probationary period under Rule .1523(c) of this subchapter shall pay a late compliance fee of \$125.00 pursuant to Rule .1523(e) of this subchapter. The board may waive the late filing penalty or the late compliance fee upon a showing of hardship or serious extenuating circumstances.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994; Amended October 1, 2003; Amended March 3, 2005; Amended March 2, 2006.

D.1524. Reinstatement.

(a) *Reinstatement within 30 days of service of suspension order.* A member who is suspended for noncompliance with the rules governing the continuing legal education program may petition the secretary for an order of reinstatement of the member's license at any time up to 30 days after the service of the suspension order upon the member. The secretary shall enter an order reinstating the member to active status upon receipt of a timely written request and satisfactory showing by the member that the member cured the continuing legal education deficiency for which the member was suspended. Such member shall not be required to file a formal reinstatement petition or pay a \$250 reinstatement fee.

(b) *Procedure for reinstatement more than 30 days after service of the order of suspension.* Except as noted below, the procedure for reinstatement more than 30 days after service of the order of suspension shall be as set forth in Rule .0904(c) and (d) of this subchapter, and shall be administered by Administrative Committee.

(c) *Reinstatement petition.* At any time more than 30 days after service of an order of suspension on a member, a member who has been suspended for noncompliance with the rules governing the continuing legal education program may seek reinstatement by filing a reinstatement petition with the secretary. The secretary shall transmit a copy of the petition to each member of the board. The reinstatement petition shall contain the information and be in the form required by Rule .0904(c) of this subchapter. If not otherwise set forth in the petition, the member shall attach a statement to the petition in which the member shall state with particularity the accredited legal education courses which the member has attended and the number of credit hours obtained in order to cure any continuing legal education deficiency for which the member was suspended.

(d) *Reinstatement fee.* In lieu of the \$125.00 reinstatement fee required by Rule .0904(c)(4)(A), the petition shall be accompanied by a reinstatement fee payable to the board, in the amount of \$250.00.

(e) *Determination of board; Transmission to Administrative Committee.* Within 30 days of the filing of the petition for reinstatement with the secretary, the board shall determine whether the deficiency has been cured. The board's written determination and the reinstatement petition shall be transmitted to the secretary within five days of the determination by the board. The secretary shall transmit a copy of the petition and the board's recommendation to each member of the Administrative Committee.

(f) *Consideration by Administrative Committee.* The Administrative Committee shall consider the reinstatement petition, together with the board's

determination, pursuant to the requirements of Rule .0902(c)-(f) of this subchapter.

(g) *Hearing upon denial of petition for reinstatement.* The procedure for hearing upon the denial by the Administrative Committee of a petition for reinstatement shall be as provided in Section .1000 of this subchapter.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711; Readopted effective December 8, 1994; Amended effective March 7, 1996; Amended effective March 6, 1997; Amended

effective February 3, 2000; March 3, 2005.

Editor's note. — This rule has been set out to correct an error appearing in the main volume.

SECTION .1600. REGULATIONS GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

D.1601. General Requirements for Course Approval.

(a) *Approval.* CLE activities may be approved upon the written application of a sponsor, other than an accredited sponsor, or of an active member on an individual program basis. An application for such CLE course approval shall meet the following requirements:

(1) If advance approval is requested by a sponsor, the application and supporting documentation, including two substantially complete sets of the written materials to be distributed at the course or program, shall be submitted at least 45 days prior to the date on which the course or program is scheduled. If advance approval is requested by an active member, the application need not include a complete set of written materials.

(2) In all other cases, the application and supporting documentation shall be submitted not later than 45 days after the date the course or program was presented or prior to the end of the calendar year in which the course or program was presented, whichever is earlier.

(3) The application shall be submitted on a form furnished by the board.

(4) The application shall contain all information requested on the form.

(5) The application shall be accompanied by a course outline or brochure that describes the content, identifies the teachers, lists the time devoted to each topic, and shows each date and location at which the program will be offered.

(6) The application shall include a detailed calculation of the total CLE hours and hours of professional responsibility.

(b) *Course Quality and Materials.* The application and materials provided shall reflect that the program to be offered meets the requirements of Rule .1519 of this subchapter. Sponsors, including accredited sponsors, and active members seeking credit for an approved activity shall furnish, upon request of the board, a copy of all materials presented and distributed at a CLE course or program. Written materials consisting merely of an outline without citation or explanatory notations generally will not be sufficient for approval. Any sponsor, including an accredited sponsor, who expects to conduct a CLE activity for which suitable written materials will not be made available to all attendees may obtain approval for that activity only by application to the board at least 45 days in advance of the presentation showing why written materials are not suitable or readily available for such a program.

(c) *Facilities.* Sponsors must provide a facility conducive to learning with sufficient space for taking notes.

(d) *Computer-Based CLE: Verification of Attendance.* The sponsor of an on-line course must have a reliable method for recording and verifying attendance. The sponsor of a CD-ROM course must demonstrate that there is

a reliable method for the user or the sponsor to record and verify participation in the course. A participant may periodically log on and off of a computer-based CLE course provided the total time spent participating in the course is equal to or exceeds the credit hours assigned to the program. A copy of the record of attendance must be forwarded to the board within 30 days after a member completes his or her participation in the course.

(e) *Records.* Sponsors, including accredited sponsors, shall within 30 days after the course is concluded

(1) furnish to the board a list in alphabetical order, in an electronic format if available, of the names of all North Carolina attendees and their North Carolina State Bar membership numbers;

(2) remit to the board the appropriate sponsor fee;

(3) furnish to the board a complete set of all written materials distributed to attendees at the course or program.

(f) *Announcement.* Accredited sponsors and sponsors who have advanced approval for courses may include in their brochures or other course descriptions the information contained in the following illustration:

This course [or seminar or program] has been approved by the Board of Continuing Legal Education of the North Carolina State Bar for continuing legal education credit in the amount of ____ hours, of which ____ hours will also apply in the area of professional responsibility. This course is not sponsored by the board.

(g) *Notice.* Sponsors not having advanced approval shall make no representation concerning the approval of the course for CLE credit by the board. The board will mail a notice of its decision on CLE activity approval requests within 30 days of their receipt when the request for approval is submitted before the program and within 30 days when the request is submitted after the program. Approval thereof will be deemed if the notice is not timely mailed. This automatic approval will not operate if the sponsor contributes to the delay by failing to provide the complete information requested by the board or if the board timely notifies the sponsor that the matter has been tabled and the reason therefor.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994; Amended October 1, 2003; March 3, 2005.

Editor's note. — This rule has been set out to correct an error appearing in the main volume.

D.1602. General course requirements.

(a) *Professional Responsibility Courses on Substance Abuse, Chemical Dependency, and Debilitating Mental Conditions.* Accredited professional responsibility courses on substance abuse, chemical dependency, and debilitating mental conditions shall concentrate on the relationship between substance abuse, chemical dependency, debilitating mental conditions, and a lawyer's professional responsibilities. Such courses may also include (1) education on the prevention, detection, treatment and etiology of substance abuse, chemical dependency, and debilitating mental conditions, and (2) information about assistance for chemically dependent or mentally impaired lawyers available through lawyers' professional organizations.

(b) *Law School Courses.* Courses offered by an ABA accredited law school with respect to which academic credit may be earned may be approved activities. Computation of CLE credit for such courses shall be as prescribed in Rule .1605(a) of this subchapter. No more than 12 CLE hours in any year may be earned by such courses. No credit is available for law school courses attended prior to becoming an active member of the North Carolina State Bar.

(c) *Nonlegal Educational Activities.* A course or segment of a course presented by a bar organization may be granted up to three hours of credit if the bar organization's course trains volunteer attorneys in service to the profession, and if such course or course segment meets the requirements of Rule .1519(2)-(7) and Rule .1601(b), (c), and (g) of this subchapter; if appropriate, up to three hours of professional responsibility credit may be granted for such course or course segment. Except as noted in the preceding sentence or in extraordinary circumstances, approval will not be given for general and personal educational activities. For example, the following types of courses will not receive approval:

(1) courses within the normal college curriculum such as English, history, social studies, and psychology;

(2) courses which deal with the individual lawyer's human development, such as stress reduction, quality of life, or substance abuse unless a course on substance abuse or mental health satisfies the requirements of Rule .1602(c);

(3) courses which deal with the development of personal skills generally, such as public speaking (other than oral argument and courtroom presentation), nonlegal writing, and financial management;

(4) courses designed primarily to sell services or products or to generate greater revenue, such as marketing or advertising (as distinguished from courses dealing with development of law office procedures and management designed to raise the level of service provided to clients).

(d) *In-House CLE and Self-Study.* No approval will be provided for in-house CLE or self-study by attorneys, except those programs exempted by the board under Rule .1501(c)(10) of this subchapter or as provided in Rule .1604(e) of this subchapter.

(e) *Bar Review/Refresher Course.* Courses designed to review or refresh recent law school graduates or attorneys in preparation for any bar exam shall not be approved for CLE credit.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711; Readopted effective December 8, 1994; Amended effective March 6, 1997; Amended effective March 5, 1998; Amended

effective March 3, 1999; Amended effective March 1, 2001; Amended effective June 7, 2001; Amended effective March 3, 2005; Amended effective March 2, 2006.

D.1604. Accreditation of Prerecorded Simultaneous Broadcast, and Computer-Based Programs.

(a) *Presentation Including Prerecorded Material.* An active member may receive credit for attendance at, or participation in, a presentation where prerecorded material is used.

(b) *Simultaneous Broadcast.* An active member may receive credit for participation in a live presentation which is simultaneously broadcast by telephone, satellite or video conferencing equipment. The member may participate in the presentation by listening to or viewing the broadcast from a location that is remote from the origin of the broadcast.

(c) *Accreditation Requirements.* A member attending a prerecorded presentation is entitled to credit if

(1) the live presentation or the presentation from which the program is recorded would, if attended by an active member, be an accredited course; and

(2) all other conditions imposed by the rules in Section .1600 of this subchapter, or by the board in advance, are met.

(d) *Minimum Registration and Verification of Attendance.* A minimum of three active members must register for the presentation of a prerecorded program. This requirement does not apply to the presentation of a live program broadcast by telephone, satellite or video conferencing equipment. Attendance

at a prerecorded or simultaneously broadcast (by telephone, satellite, or video conferencing) program must be verified by (1) the sponsor's report of attendance or (2) the execution of an affidavit of attendance by the participant.

(e) *Computer-Based CLE*. Effective for courses attended on or after July 1, 2001, a member may receive up to four (4) hours of credit annually for participation in a course on CD-ROM or on-line. A CD-ROM course is an educational seminar on a compact disk that is accessed through the CD-ROM drive of the user's personal computer. An on-line course is an educational seminar available on a provider's website reached via the Internet.

(1) A member may apply up to four credit hours of computer-based CLE to a CLE deficit from a preceding calendar year. Any computer-based CLE credit hours applied to a deficit from a preceding year will be included in calculating the maximum of four (4) hours of computer-based CLE allowed in the preceding calendar year. A member may carry over to the next calendar year no more than four credit hours of computer-based CLE pursuant to Rule .1518(c) of this subchapter. Any credit hours carried-over pursuant to Rule .1518(c) of this subchapter will not be included in calculating the four (4) hours of computer-based CLE allowed in any one calendar year.

(2) To be accredited, a computer-based CLE course must meet all of the conditions imposed by the rules in Section .1600 of this subchapter, or by the board in advance, except where otherwise noted, and be interactive, permitting the participant to communicate, via telephone, electronic mail, or a website bulletin board, with the presenter and/or other participants.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711; Readopted effective December 8, 1994; Amended effective March 6, 1997; March 3, 2005; Amended effective May 4, 2005; Amended effective March 2, 2006.

SECTION .1700. THE PLAN OF LEGAL SPECIALIZATION

D.1720. Minimum standards for certification of specialists.

(a) To qualify for certification as a specialist, a lawyer applicant must pay any required fee, comply with the following minimum standards, and meet any other standards established by the board for the particular area of specialty.

(1) The applicant must be licensed in a jurisdiction of the United States for at least five years immediately preceding his or her application and must be licensed in North Carolina for at least three years immediately preceding his or her application. The applicant must be currently in good standing to practice law in this state.

(2) The applicant must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of substantial involvement in the specialty during the five years immediately preceding his or her application according to objective and verifiable standards. Such substantial involvement shall be defined as to each specialty from a consideration of its nature, complexity, and differences from other fields and from consideration of the kind and extent of effort and experience necessary to demonstrate competence in that specialty. It is a measurement of actual experience within the particular specialty according to any of several standards. It may be measured by the time spent on legal work within the areas of the specialty, the number or type of matters handled within a certain period of time or any combination of these or other appropriate factors. However, within each specialty, experience requirements should be measured by objective standards. In no event should they be either so restrictive as to unduly limit certification of lawyers as specialists or so lax as to make the requirement of substantial involvement meaningless as a criterion of competence. Substantial involve-

ment may vary from specialty to specialty, but, if measured on a time-spent basis, in no event shall the time spent in practice in the specialty be less than 25 percent of the total practice of a lawyer engaged in a normal full-time practice. Reasonable and uniform practice equivalents may be established including, but not limited to, successful pursuit of an advance educational degree, teaching, judicial, government, or corporate legal experience.

(3) The applicant must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of continuing legal education in the specialty accredited by the board for the specialty, the minimum being an average of 12 hours of credit for continuing legal education, or its equivalent, for each of the three years immediately preceding application. Upon establishment of a new specialty, this standard may be satisfied in such manner as the board, upon advice from the appropriate specialty committee, may prescribe or may be waived if, and to the extent, accreditable continuing legal education courses have not been available during the three years immediately preceding establishment of the specialty.

(4) The applicant must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of qualification in the specialty through peer review by providing, as references, the names of at least five lawyers, all of whom are licensed and currently in good standing to practice law in this state, or in any state, or judges, who are familiar with the competence and qualification of the applicant as a specialist. None of the references may be persons related to the applicant or, at the time of application, a partner of or otherwise associated with the applicant in the practice of law. The applicant by his or her application consents to confidential inquiry by the board or appropriate disciplinary body and other persons regarding the applicants competence and qualifications to be certified as a specialist.

(5) The applicant must achieve a satisfactory score on a written examination designed to test the applicant's knowledge and ability in the specialty for which certification is applied. The examination must be applied uniformly to all applicants within each specialty area. The board shall assure that the contents and grading of the examination are designed to produce a uniform level of competence among the various specialties.

(b) All matters concerning the qualification of an applicant for certification, including, but not limited to, applications, references, tests and test scores, files, reports, investigations, hearings, findings, recommendations, and adverse determinations shall be confidential so far as is consistent with the effective administration of this plan, fairness to the applicant and due process of law.

(c) The board may adopt uniform rules waiving the requirements of Rules .1720(a)(4) and(5) above for members of a specialty committee at the time the initial written examination for that specialty is given and permitting said members to file applications to become a board certified specialist in that specialty upon compliance with all other required minimum standards for certification of specialists.

(d) Upon written request of the applicant and with the recommendation of the appropriate specialty committee, the board may for good cause shown waive strict compliance with the criteria relating to substantial involvement, continuing legal education, or peer review, as those requirements are set forth in the standards for certification for specialization. However, there shall be no waiver of the requirements that the applicant pass a written examination and be licensed to practice law in North Carolina for five years preceding the application.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended Effective March 3, 2005.

Editor's note. — This rule has been set out to correct an error appearing in the main volume.

SECTION .2800. CERTIFICATION STANDARDS FOR THE SOCIAL SECURITY DISABILITY LAW SPECIALTY

D.2801. Establishment of specialty field.

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates Social Security disability law as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

History Note: Statutory Authority G.S. 84-23, Adopted March 2, 2006.

D.2802. Definition of Specialty.

The specialty of Social Security disability law is the practice of law relating to the analysis of claims and controversies arising under Title II and Title XVI of the Social Security Act and the representation of claimants in those matters before the Social Security Administration and/or the federal courts.

History Note: Statutory Authority G.S. 84-23, Adopted March 2, 2006.

D.2803. Recognition as a Specialist in Social Security Disability Law.

If a lawyer qualifies as a specialist in Social Security disability law by meeting the standards set for the specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Social Security Disability Law."

History Note: Statutory Authority G.S. 84-23, Adopted March 2, 2006.

D.2804. Applicability of provisions of the North Carolina Plan of Legal Specialization.

Certification and continued certification of specialists in Social Security disability law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

History Note: Statutory Authority G.S. 84-23, Adopted March 2, 2006.

D.2805. Standards for certification as a Specialist in Social Security Disability Law.

Each applicant for certification as a specialist in Social Security disability law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in Social Security disability law:

(a) *Licensure and Practice.* An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An

applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) *Substantial Involvement*. An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of Social Security disability law.

(1) "Substantial involvement" shall mean during the five years immediately preceding the application, the applicant devoted an average of at least 600 hours a year to the practice of Social Security disability law, but not less than 500 hours in any one year. "Practice" shall mean substantive legal work done primarily for the purpose of providing legal advice or representation, or a practice equivalent.

(2) "Practice equivalent" shall mean:

(A) Service as a law professor concentrating in the teaching of Social Security disability law for one year or more may be substituted for one year of experience to meet the five-year requirement set forth in Rule .2805(b)(1) above;

(B) Service as a Social Security administrative law judge, Social Security staff lawyer, or assistant United States attorney involved in cases arising under Title II and Title XVI may be substituted for three of the five years necessary to satisfy the requirement set forth in Rule .2805(b)(1) above;

(3) The board may require an applicant to show substantial involvement in Social Security disability law by providing information regarding the applicant's participation, during his or her legal career, as primary counsel of record in the following:

(A) Proceedings before an administrative law judge;

(B) Cases appealed to the appeals council of the Social Security Administration; and

(C) Cases appealed to federal district court.

(c) *Continuing Legal Education*. An applicant must earn no less than 36 hours of accredited continuing legal education (CLE) credits in Social Security disability law and related fields during the three years preceding application, with not less than six credits earned in any one year. Of the 36 hours of CLE, at least 18 hours shall be in Social Security disability law, and the balance may be in the following related fields: trial skills and advocacy; practice management; medical injuries, medicine, or anatomy; ERISA; labor and employment law; elder law; workers' compensation law; and the law relating to long term disability or Medicaid/Medicare claims.

(d) *Peer Review*. An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice law in a jurisdiction in the United States and have substantial practice or judicial experience in Social Security disability law. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms mailed by the board to each reference. These forms shall be returned directly to the specialty committee.

(e) *Examination*. An applicant must pass a written examination designed to demonstrate sufficient knowledge, skills, and proficiency in the field of Social

Security disability law to justify the representation of special competence to the legal profession and the public. The examination shall be given annually in written form and shall be administered and graded uniformly by the specialty committee.

(1) *Subject Matter.* The examination shall cover the applicant's knowledge and application of the law relating to the following:

- (A) Title II and Title XVI of the Social Security Act;
- (B) Federal practice and procedure in Social Security disability cases;
- (C) Medical proof of disability;
- (D) Vocational aspects of disability;
- (E) Workers' compensation offset;
- (F) Eligibility for Medicare and Medicaid;
- (G) Eligibility for Social Security retirement and survivors benefits;
- (H) Interaction of Social Security benefits with employee benefits (e.g., long term disability and back pay);
- (I) Equal Access to Justice Act; and
- (J) Fee collection and other ethical issues in Social Security practice.

History Note: Statutory Authority G.S. 84-23, Adopted March 2, 2006.

D.2806. Standards for continued certification as a specialist.

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2806(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) *Substantial Involvement.* The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2805(b) of this subchapter.

(b) *Continuing Legal Education.* The specialist must earn no less than 60 hours of accredited continuing legal education credits in Social Security disability law and related fields during the five years preceding application. Not less than six of the credits may be earned in any one-year. Of the 60 hours of CLE, at least 20 hours shall be in Social Security disability law, and the balance may be in the following related fields: trial skills and advocacy; practice management; medical injuries, medicine or anatomy; ERISA; labor and employment law; elder law; workers' compensation law; and the law relating to long term disability or Medicaid/Medicare claims.

(c) *Peer Review.* The specialist must comply with the requirements of Rule .2805(d) of this subchapter.

(d) *Time for Application.* Application for continued certification shall be made not more than 180 days nor less than 80 days prior to the expiration of the prior period of certification.

(e) *Lapse of Certification.* Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2805 of this subchapter, including the examination.

(f) *Suspension or Revocation of Certification.* If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2805 of this subchapter.

History Note: Statutory Authority G.S. 84-23, Adopted March 2, 2006.

D.2807. Applicability of other requirements.

The specific standards set forth herein for certification of specialists in Social Security disability law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

History Note: Statutory Authority G.S. 84-23, Adopted March 2, 2006.

SECTION .0100. THE PLAN FOR CERTIFICATION OF PARALEGALS

G.0104. Size and Composition of Board.

The board shall have nine members, five of whom must be lawyers in good standing and authorized to practice law in the state of North Carolina. One of the members who is a lawyer shall be a program director at a qualified paralegal studies program. Four members of the board shall be paralegals certified under the plan, provided, however, that the paralegals appointed to the inaugural board shall be exempt from this requirement during their initial and successive terms but each such member shall be eligible, during the shorter of such initial term or the alternative qualification period, for certification by the board upon the board's determination that the member meets the requirements for certification in Rule .0119(b).

History Note: Adopted October 6, 2004; amended effective March 2, 2006.

G.0115. Powers and Duties of the Board.

Subject to the general jurisdiction of the council and the North Carolina Supreme Court, the board shall have jurisdiction of all matters pertaining to certification of paralegals and shall have the power and duty

- (1) to administer the plan of certification for paralegals;
- (2) to appoint, supervise, act on the recommendations of, and consult with committees as appointed by the board or the chairperson;
- (3) to certify paralegals or deny, suspend or revoke the certification of paralegals;
- (4) to establish and publish procedures, rules, regulations, and bylaws to implement this plan;
- (5) to propose and request the council to make amendments to this plan whenever appropriate;
- (6) to cooperate with other boards or agencies in enforcing standards of professional conduct;
- (7) to evaluate and approve continuing legal education courses for the purpose of meeting the continuing legal education requirements established by the board for the certification of paralegals;
- (8) to cooperate with other organizations, boards and agencies engaged in the recognition, education or regulation of paralegals; and
- (9) to set fees, with the approval of the council, and to, in appropriate circumstances, waive such fees.

History Note: Adopted October 6, 2004;
Amended effective March 2, 2006.

G.0118. Certification Committee.

(a) The board shall establish a separate certification committee. The certification committee shall be composed of seven members appointed by the board, one of whom shall be designated annually by the chairperson of the board as chairperson of the certification committee. At least two members of the committee shall be lawyers, licensed and currently in good standing to practice law in this state, and two members of the committee shall be certified paralegals. The remaining members of the committee shall be either lawyers, licensed and currently in good standing to practice law in this state, or certified paralegals. The paralegals appointed to the inaugural committee shall be exempt from the certification requirement during their initial term but each such member shall be eligible, during the shorter of such initial term or the alternative qualification period, for certification by the board upon the board's determination that the committee member meets the requirements for certification in Rule .0119(b).

(b) Members shall hold office for three years, except those members initially appointed who shall serve as hereinafter designated. Members shall be appointed by the board to staggered terms and the initial appointees shall serve as follows: two shall serve for one year after appointment; two shall serve for two years after appointment; and three shall serve for three years after appointment. Appointment by the board to a vacancy shall be for the remaining term of the member leaving the committee. All members shall be eligible for reappointment to not more than one additional three-year term, provided, however, that the board may reappoint the chairperson of the committee to a third three-year term if the board determines that the reappointment is in the best interest of the program. Meetings of the certification committee shall be held at regular intervals at such times, places and upon such notices as the committee may from time to time prescribe or upon direction of the board.

(c) The committee shall advise and assist the board in carrying out the board's objectives and in the implementation and regulation of this plan by advising the board as to standards for certification of individuals as paralegals. The committee shall be charged with actively administering the plan as follows:

(1) make recommendations to the board for certification, continued certification, denial, suspension, or revocation of certification of paralegals and for procedures with respect thereto;

(2) administer procedures established by the board for evaluation of applications for certification and continued certification as a paralegal and for denial, suspension, or revocation of such certification;

(3) administer examinations and other testing procedures, if applicable, investigate references of applicants and, if deemed advisable, seek additional information regarding applicants for certification or continued certification as paralegals; and

(4) perform such other duties and make such other recommendations as may be delegated to or requested by the board.

History Note: Adopted October 6, 2004;
Amended effective March 2, 2006.

G.0119. Standards for Certification of Paralegals.

(a) To qualify for certification as a paralegal, an applicant must pay any required fee, and comply with the following standards:

(1) *Education.* The applicant must have earned one of the following:

a. an associate's, bachelor's, or master's degree or post-baccalaureate certificate from a qualified paralegal studies program; or

b. an associate's or bachelor's degree in any discipline from any institution of post-secondary education that is accredited by an accrediting body recognized by the United States Department of Education; and successfully completed at least the equivalent of 18 semester credits at a qualified paralegal studies program, any portion of which credits may also satisfy the requirements for the associate's or bachelor's degree.

(2) *Examination.* The applicant must achieve a satisfactory score on a written examination designed to test the applicant's knowledge and ability. The board shall assure that the contents and grading of the examinations are designed to produce a uniform minimum level of competence among the certified paralegals.

(b) *Alternative Qualification Period.* For a period not to exceed two years after the date that applications for certification are first accepted by the board, an applicant may qualify by satisfying one of the following:

(1) earned a high school diploma, or its equivalent, worked as a paralegal and/or a paralegal educator in North Carolina for not less than 5000 hours during the five years prior to application, and, during the 12 months prior to application, completed three hours of continuing legal education in professional responsibility, as approved by the board;

(2) obtained and maintained at all times prior to application the designation Certified Legal Assistant (CLA)âertified Paralegal (CP), PACE-Registered Paralegal (RP), or other national paralegal credential approved by the board, and worked as a paralegal and/or a paralegal educator in North Carolina for not less than 2000 hours during the two years prior to application; or

(3) fulfilled the educational requirements set forth in Rule .0119(a)(1)a. or b. and worked as a paralegal and/or a paralegal educator in North Carolina for not less than 2000 hours during the two years prior to application.

(c) Notwithstanding an applicant's satisfaction of the standards set forth in Rule .0119(a) or (b), no individual may be certified as a paralegal if:

(1) the individual's certification or license as a paralegal in any state is under suspension or revocation;

(2) the individual's license to practice law in any state is under suspension or revocation;

(3) the individual has been convicted of a criminal act that reflects adversely on the individual's honesty, trustworthiness or fitness as a paralegal; or

(4) the individual is not a legal resident of the United States.

(d) All matters concerning the qualification of an applicant for certification, including, but not limited to, applications, examinations and examination scores, files, reports, investigations, hearings, findings, recommendations, and adverse determinations shall be confidential so far as is consistent with the effective administration of this plan, fairness to the applicant and due process of law.

(e) *Qualified Paralegal Studies Program.* A qualified paralegal studies program is a program of paralegal or legal assistant studies that is an institutional member of the Southern Association of Colleges and Schools or other regional accrediting agency recognized by the United States Department of Education, and is either

(1) approved by the American Bar Association;

(2) an institutional member of the American Association for Paralegal Education; or

(3) offers at least the equivalent of 18 semester credits of coursework in paralegal studies as prescribed by the American Bar Association Guidelines for the Approval of Paralegal Education.

(f) *Designation as a Qualified Paralegal Studies Program.* The board shall determine whether a paralegal studies program is a qualified paralegal studies program upon submission by the program of an application to the board provided, however, a paralegal studies program is not required to submit an application for qualification as long as the program satisfies the requirements of Rule .0119(e)(1) or (2).

(1) A program designated by the board as a qualified paralegal studies program shall renew its application for designation every five years.

(2) An applicant for certification who lists on a certification application a paralegal studies program that does not satisfy the requirements of Rule .0119(e)(1) or (2) or that has not been designated by the board as a qualified paralegal studies program shall be responsible for obtaining a completed application for designation from the program or shall submit the information required on the application for determination that the program is a qualified paralegal studies program.

(3) Designation of a paralegal studies program as a qualified paralegal studies program under this section does not constitute an approval or an endorsement of the program by the board or the North Carolina State Bar.

History Note: Adopted October 6, 2004;
Amended effective March 2, 2006.

SECTION .0200. RULES GOVERNING CONTINUING PARALEGAL EDUCATION.

Rule G.0202. Accreditation Standards.

The Board of Paralegal Certification shall approve continuing education activities in compliance with the following standards and provisions.

(1) An approved activity shall have significant intellectual or practical content and the primary objective of increasing the participant's professional competence and proficiency as a paralegal.

(2) An approved activity shall constitute an organized program of learning dealing with matters directly related to the practice of law, professional responsibility, professionalism, or ethical obligations of paralegals.

(3) A certified paralegal may receive credit for continuing education activities where live instruction is used or mechanically or electronically recorded or reproduced material is used, including videotape or satellite transmitted programs. A minimum of three certified paralegals must register to attend the presentation of a prerecorded program. This requirement does not apply to participation from a remote location in the presentation of a live broadcast by telephone, satellite, or video conferencing equipment.

(4) A certified paralegal may receive credit for participation in a course on CD-ROM or on-line. A CD-ROM course is an educational seminar on a compact disk that is accessed through the CD-ROM drive of the user's personal computer. An on-line course is an educational seminar available on a provider's website reached via the internet. To be accredited, a computer-based CLE course must be interactive, permitting the participant to communicate, via telephone, electronic mail, or a website bulletin board, with the presenter and/or other participants.

(5) Continuing education materials are to be prepared, and activities conducted, by an individual or group qualified by practical or academic experience in a setting physically suitable to the educational activity of the program and, when appropriate, equipped with suitable writing surfaces or sufficient space for taking notes.

(6) Thorough, high quality, and carefully prepared written materials should be distributed to all attendees at or before the time the course is presented.

These may include written materials printed from a computer presentation, computer website, or CD-ROM. A written agenda or outline for a presentation satisfies this requirement when written materials are not suitable or readily available for a particular subject. The absence of written materials for distribution should, however, be the exception and not the rule.

(7) Any continuing legal education activity approved for lawyers by the North Carolina State Bar's Board of Continuing Legal Education meets these standards.

(8) In-house continuing legal education and self-study shall not qualify for continuing paralegal education (CPE) credit.

History Note: Statutory Authority G.S. 84-23, Adopted August 18, 2005; Amended effective March 2, 2006.

SECTION .0100. REGISTRATION PROCEDURE

Rule H.0100. Registration.

(a) Whenever an out-of-state attorney (the admittee) is admitted to practice *pro hac vice* pursuant to G.S. 84-4.1, it shall be the responsibility of the member of the North Carolina State Bar who is associated in the matter (the responsible attorney) to file with the secretary a complete registration statement verified by the admittee. This registration statement must be submitted within 30 days of the court's order admitting the admittee upon a form approved by the Council of the North Carolina State Bar.

(b) Failure of the responsible attorney to file the registration statement in a timely fashion shall be grounds for administrative suspension from the practice of law in North Carolina pursuant to the procedures set forth in Rule .0903 of subchapter D of these rules.

(c) Whenever it appears that a registration statement required by paragraph (a) above has not been filed in a timely fashion, notice of such apparent failure shall be sent by the secretary to the court in which the admittee was admitted *pro hac vice* for such action as the court deems appropriate.

History Note: Adopted March 2, 2006.

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THE REVISED RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

Revised effective February 27, 2003,
with amendments effective October 6, 2004.

A complete set of all referenced ethics opinions may be obtained from the North Carolina State Bar. Contact Jennifer Eichenberger, Director of Communications, P.O. Box 25908, Raleigh, N.C. 27611.

Rule

1.13. Organization as client.

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Cited in Mayfield v. Parker Hannifin, — N.C. App. —, 621 S.E.2d 243, 2005 N.C. App. LEXIS 2472 (2005).

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basis of the later case against the pharmacy; the firm failed to show that information about plaintiff was not shared with other firm members. Ferguson v. DDP Pharm., Inc., — N.C. App. —, 621 S.E.2d 323, 2005 N.C. App. LEXIS 2492 (2005).

Rule 1.10. Imputation of conflicts of interest: General rule.

CASE NOTES

Disqualification of Attorney Proper. — Disqualification of an attorney from representing a pharmacy in a case brought against it by plaintiff was proper where plaintiff had consulted with another lawyer in the attorney's firm about the criminal charges which were the

basis of the later case against the pharmacy; the firm failed to show that information about plaintiff was not shared with other firm members. Ferguson v. DDP Pharm., Inc., — N.C. App. —, 621 S.E.2d 323, 2005 N.C. App. LEXIS 2492 (2005).

Rule 1.13. Organization as client.

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to

do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may reveal such information outside the organization to the extent permitted by Rule 1.6 and may resign or withdraw in accordance with Rule 1.16.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employer, or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under these Rules, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

COMMENT

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the law-

yer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization may be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is a violation of the law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(g), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due con-

sideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rule 1.6, 1.8, 1.16, 3.3 or 4.1. If the lawyer reasonably believes that disclosure of information protected by Rule 1.6 is necessary to prevent the commission of a crime by an organizational

client, for example, disclosure is permitted by Rule 1.6(b)(2).

If the lawyer's services are being or have been used by an organizational client to further a crime or fraud by the organization, Rule 1.6(b)(4) permits the lawyer to disclose confidential information to prevent, mitigate, or rectify the consequences of such conduct. In such circumstances, Rule 1.2(d) may be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee, or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) and (c), or who withdraws in circumstances that require or permit the lawyer to take action under these Rules, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or

lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances, the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Paragraph (g) recognizes that a lawyer

for an organization may also represent a principal officer or major shareholder, director, employee, member, or other constituent.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003; Amended March 2, 2006.

INDIGENT DEFENSE SERVICES

Adopted July 1, 2001, with amendments through February 10, 2006

Part 1

Rules for the Continued Delivery of Services in Non-Capital Criminal and Non-Criminal Cases at the Trial Level

Rule

- 1.5. Appointment Procedure.

Part 2

Rules for Providing Legal Representation in Capital cases

- 2B.2. Appointment of Appellate Counsel.
2A.2. (App.) Applications.
2A.3. (App.) Retention and Eligibility.

Rule

- 2B.2. (App.) Applications.
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2C.3. (App.) Retention and Eligibility.

Part 3

Rules for Providing Legal Representation in Non-Capital Criminal Appeals and Non-Criminal Appeals

- 3.2. Appointment of Appellate Counsel.
3.4. Standards for Appellate Counsel.
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PART 1

RULES FOR THE CONTINUED DELIVERY OF SERVICES IN NON-CAPITAL CRIMINAL AND NON-CRIMINAL CASES AT THE TRIAL LEVEL

This first part addresses the procedure for appointing and compensating counsel in all cases subject to the oversight of the Office of Indigent Defense Services (IDS Office), except for capital cases, which are covered by Part 2 of these rules, and appellate cases, which are covered by Part 3 of these rules. These rules are authorized by the Indigent Defense Services Act of 2000 (IDS Act), S.L. 2000-144, Senate Bill 1323, and apply to cases pending on or after July 1, 2001.

The principal aim of this first part is to ensure that the system for appointing and compensating counsel at the trial level in non-capital criminal and non-criminal cases is not disrupted. Because of the sheer number of such cases handled by appointed counsel (approximately 120,000 in fiscal year 1999-2000 alone), these rules continue most of the current practices and procedures, allowing the IDS Office to consider and implement changes over time after considering the suggestions and advice of the bar, bench, and other interested persons.

The rules are drawn in large part from the North Carolina General Statutes (G.S.), as revised by the IDS Act, and Section D.0400 and D.0500 of the Rules and Regulations of the North Carolina State Bar (State Bar Rules). That section of the State Bar Rules is no longer effective beginning July 1, 2001, because the authorization for those rules, in former G.S. 7A-459, was repealed effective that date.

Whenever the term "IDS Director" is used in these rules, it means the Director of the Office of Indigent Defense Services or his or her designee. Whenever the term "IDS Office" is used in these rules, it means the Office of Indigent Defense Services or its designee. Whenever the term "IDS Commission" is used in these rules, it means the Commission on Indigent Defense Services or its designee.

These rules may be changed by the IDS Commission pursuant to its authority. (Adopted July 1, 2001.)

Rule 1.1. Coverage and Definitions.

Authority: G.S. 7A-452(c)(1); 7A-498.3(a)

Commentary:

Subsection (1): G.S. 7A-498.3(a) places virtually all cases in which a person is entitled to counsel at state expense under the oversight of the IDS Office. The cases covered are:

1. cases in which an indigent person is entitled to legal representation under G.S. 7A-451 and G.S. 7A-451.1;
2. cases in which the IDS Office is designated by other statutes as responsible for providing legal representation; and
3. cases in which an indigent person is subject to a deprivation of liberty or other constitutionally protected interest, and is entitled by law to legal representation.

Most of the cases in which a person has a right to counsel fall within the first category — that is, cases designated in G.S. 7A-451 and 7A-451.1. Readers should consult those statutes for a complete listing of proceedings.

The General Assembly has recognized a right to counsel in miscellaneous proceedings not covered by G.S. 7A-451 and 7A-451.1, and with respect to most of those proceedings the provision of counsel is subject to the oversight of the IDS Office. The covered cases include:

— cases in which the parent, guardian, or custodian of a juvenile who has run away petitions a court for issuance of a requisition for the juvenile's return, and the juvenile is subsequently brought before a court pursuant to a detention order under G.S. 7B-2804(a);

— cases in which a delinquent juvenile has absconded from probation or parole supervision, or escaped from institutional custody, and the juvenile is subsequently brought before a court pursuant to a detention order under G.S. 7B-2805(a);

— cases in which a law enforcement officer has seized property from an unknown or unapprehended defendant, or from a defendant willfully absent from the jurisdiction, and the lawful owner petitions a court for return of the property pursuant to G.S. 15A-11.1(b);

— cases in which a person is subject to a non-testimonial identification procedure under G.S. 15A-279(d);

— cases in which a material witness appears for a hearing on a motion for an order assuring his or her attendance at a criminal proceeding under G.S. 15A-803(d);

— cases in which a criminal defendant elects to represent himself or herself and the court determines that standby counsel should be appointed pursuant to G.S. 15A-1243;

— cases in which a person is taken or

charged on any order of arrest for default of bail, or on surrender of bail, or in execution of arrest for any debt or damages rendered in any action, and such person petitions the court for provisional release pursuant to G.S. 23-30.1; and

— cases in which a minor has been voluntarily admitted to a mental health or substance abuse facility pursuant to G.S. 122C-224.1.

Also included in this second category are cases in which the guardian ad litem program operated by the Administrative Office of the Courts (AOC) has a conflict of interest and is unable to represent a juvenile alleged to be abused, neglected, or dependent. Under G.S. 7B-1202, the court may appoint a private attorney to represent the juvenile. Provision of legal representation in cases in which the court appoints a private attorney is subject to the oversight of the IDS Office; cases in which the AOC's guardian ad litem program provides representation are not subject to IDS oversight.

The third category of cases under IDS oversight are cases in which the courts have recognized a right to appointed counsel. For example, the defendant has a constitutional right to counsel in child support contempt proceedings in which the defendant faces a sentence of actual imprisonment. See *McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993) (finding right to counsel whether contempt proceeding is designated as civil or criminal).

Subsections (2) and (3): Capital cases are addressed in a separate part because of the differing treatment of those cases in the IDS Act. In non-capital criminal cases, the court appoints counsel pursuant to rules adopted by the IDS Office. In capital cases, the IDS Director appoints counsel directly. See G.S. 7A-452(a) (generally); see also G.S. 7A-451(c) (capital post-conviction cases). Appellate cases are also dealt with separately because of the relatively small number of such cases. The IDS Office is in a position to establish and administer procedures for the appointment and compensation of appellate counsel, relieving trial judges of that burden.

Effective May 6, 2005, subsection (2) was amended to clarify that the term "capital case" refers only to cases in which the defendant is eligible to receive the death penalty, and does not refer to those cases in which life imprisonment without parole is the maximum possible punishment because the defendant was under the age of 18 at the time of the offense. See G.S. 14-17; *Roper v. Simmons*, 2005 U.S. LEXIS 2200, 125 S. Ct. 1183 (2005).

Rule 1.5. Appointment Procedure.*(a) Districts Without a Public Defender Office.*

(1) In judicial districts that do not have a public defender office, each judicial district bar or county bar association shall adopt a plan or plans for the appointment by the court of qualified members of the private bar to represent indigent persons in non-capital criminal cases at the trial level. The plan may also include procedures for the appointment of counsel by the court in non-criminal cases at the trial level. Any plan adopted by a judicial district bar or county bar association shall provide for appointment of counsel on a systematic and impartial basis. To the extent a judicial district bar or county bar association plan does not address non-criminal or other categories of cases, the court shall appoint counsel in those cases on a systematic and impartial basis. A plan may be applicable to the entire district, or, at the election of the judicial district bar or county bar association, separate plans may be adopted by the district bar for use in each separate county within the district.

(2) Except as otherwise provided by the IDS Office, the plan or plans for a district or county in effect on June 30, 2001, shall govern the method by which counsel are thereafter selected in that district or county for appointment in non-capital criminal and non-criminal cases at the trial level. A plan is considered to be "in effect" on June 30, 2001, if by that date it has been adopted by the judicial district bar or county bar association, approved by the North Carolina State Bar, and certified to the clerk of superior court of the county to which the plan is applicable by the Secretary of the North Carolina State Bar.

(3) Beginning July 1, 2001, any revisions in a district or county plan must be adopted by the judicial district bar or county association and approved by the IDS Commission, following which the IDS Director shall certify the revised plan or plans to the clerk of superior court to which the plan or plans are applicable.

(4) Any provisions in district or county plans concerning appointment of counsel in capital or appellate cases, as defined in Parts 2 and 3 of these rules, shall be of no effect as of July 1, 2001.

(5) Any provisions in district or county plans that are inconsistent with rules now or hereafter adopted by the IDS Office shall be of no effect as of July 1, 2001.

(b) Districts with a Public Defender Office.

(1) No later than November 1, 2001, in judicial districts with a public defender office, the Public Defender shall submit to the IDS Director a proposed plan for the appointment of counsel in all cases subject to this part. The proposed plan shall provide for the making of appointments under the oversight of and pursuant to procedures adopted by the Public Defender.

(2) In developing the proposed plan, the Public Defender shall consult with the IDS Director and with the judicial district bench and bar in which the public defender's office is located. The IDS Director shall thereafter submit the proposed plan to the IDS Commission, which may approve the plan as submitted, modify it, or reject it. The plan adopted by the IDS Commission shall become the plan for appointment of counsel in that judicial district.

(3) After the Commission has adopted the initial plan for a judicial district with a public defender office, the IDS Director may, after consulting with the Public Defender, modify the plan and the requirements and procedures for appointing counsel in that judicial district as necessary to effectuate the purposes of the IDS Act. If any modifications being considered by the IDS Director substantially change the plan, the IDS Director shall submit the proposed changes to the IDS Commission for approval.

(4) Until a Public Defender's plan is approved by the IDS Commission, the court shall continue to appoint counsel in accordance with current procedure.

(5) The Public Defender shall not be appointed to represent, and shall not assign counsel to represent, a juvenile alleged to be abused, neglected, or dependent. In cases in which the guardian ad litem program operated by the Administrative Office of the Courts is unable to represent the juvenile, the court shall continue to appoint counsel for juveniles pursuant to G.S. 7B-1202.

(c) *Districts with a Special Counsel Office.* In judicial districts with a special counsel program, the court shall continue to appoint special counsel, pursuant to G.S. 122C-270, to represent all indigent respondents at all hearings, rehearings, and supplement hearings held at the state facility and on appeal. For cases assigned to a special counsel office that the office is unable to handle, the special counsel office shall adopt a plan for assigning such cases to qualified members of the private bar. The special counsel office shall submit any plan for approval and certification by the IDS Director.

(d) *Appointments Pursuant to Plans.*

(1) Except as otherwise provided by the IDS Director, all appointments of counsel in cases subject to this part shall be made in conformity with the plans described in this rule, unless the judge in cases subject to subsection (a), above, or the authority authorized to make appointments in cases subject to subsections (b) and (c), above, deems it proper in the furtherance of justice to appoint as counsel for a person a lawyer who is not on the certified plan or list or who is not next in sequence on the list.

(2) No attorney shall be appointed as counsel for a person in a non-capital criminal or non-criminal case in a court of any district unless the attorney has consented to placement of his or her name on the list of attorneys subject to appointment or, if the attorney has not agreed to do so, has otherwise consented to be appointed. The attorney named in the appointment order shall not delegate to another attorney any material responsibilities to the client, including representation at critical stages of the case.

(3) No person for whom counsel is appointed shall be entitled to select or specify the attorney assigned to defend him or her.

(e) *Record Keeping.*

(1) In districts without a public defender office, the clerk of superior court of each county, under the direction of the Administrative Office of the Courts pursuant to G.S. 7A-343(3) and (10), shall continue to file in his or her office, maintain, and keep current the plan for assignment of counsel in non-capital criminal and non-criminal cases, and a record of all counsel eligible for appointment under the plan, applicable to said county as certified by the Secretary of the North Carolina State Bar or IDS Director, as the case may be.

(2) No later than November 1, 2001, in districts with a public defender office, the Public Defender shall file in his or her office, maintain, and keep current the plan for assignment of counsel in non-capital criminal and non-criminal cases pursuant to subsection (b), above, and a record of all counsel eligible for appointment under the plan, applicable to said district as certified by the IDS Director.

(3) In districts with a special counsel program, the special counsel shall file in his or her office, maintain, and keep current the plan for assignment of counsel pursuant to subsection (c), above, and a record of all counsel eligible for appointment under the plan, applicable to said district as certified by the IDS Director.

(4) Orders for the appointment of counsel shall be entered by the court on a form approved by the IDS Director.

(f) *Authority to Implement Other Programs, Plans, and Contracts.* Nothing in these rules shall prohibit assignment of otherwise qualified counsel to represent indigent defendants pursuant to programs, plans, or contracts that may be implemented from time to time to improve quality, efficiency, and economy where such programs, plans, or contracts are approved by the IDS

Director. Nothing in these rules shall preclude the IDS Commission from adopting and enforcing rules that supercede a judicial district bar plan. (Adopted July 1, 2001; Subsection (d) amended effective July 8, 2005; Subsection (a) amended effective February 10, 2006.)

Subsection (a): The IDS Commission recognizes the continuing importance of district and county bar plans to the operation of the system, and in most respects this rule keeps the current plans in effect until the IDS Commission and IDS Office consider and implement changes. If a district bar or county bar association wishes to make changes to a plan after July 1, 2001, the changes must be approved by the IDS Commission rather than the North Carolina State Bar, which reflects the changes in authority implemented by the IDS Act. Many district and county bar plans do not specifically address non-criminal cases. If a plan does not address such cases, the court should appoint counsel on a systematic and impartial basis.

Subsection (d): As in the past, appointments should be made in accordance with the plans for each district. The subsection makes some changes, however. First, subsection (1)

clarifies that in the interest of justice an attorney may be appointed who is not on the list regardless of whether the attorney regularly practices in the district. Second, subsection (2) prohibits appointment of an attorney unless the attorney consents to appointment, either by agreeing to be on the list or, if not on the list, by consenting to being appointed. Subsection (d)(2) was amended effective July 8, 2005 to clarify that an attorney appointed to a case may not delegate material responsibility for that case to another attorney who is not named in the appointment order. See *State v. Carter*, 66 N.C. App. 21, 23, 311 S.E.2d 5, 7 (1984); RPC 58 (1989). If an appointed attorney is unable to appear at a scheduled court appearance due to a conflict in another court, illness, or a family emergency, subsection (d) does not prohibit the attorney from asking another lawyer to appear on his or her behalf and seek a continuance.

PART 2

RULES FOR PROVIDING LEGAL REPRESENTATION IN CAPITAL CASES

This second part addresses the procedure to be followed in capital cases. The rules are authorized by the Indigent Defense Services Act of 2000 (IDS Act), S.L. 2000-144, Senate Bill 1323, and apply to cases pending on or after July 1, 2001. Fee applications for capital representation filed on or after that date will be governed by these rules.

These rules are intended to set forth a comprehensive system for providing legal representation in cases that potentially may be tried capitally or that have resulted in a sentence of death. Unlike the Rules for Continued Delivery of Services in Non-Capital Criminal and Non-Criminal Cases, described in Part 1, this part departs significantly from previous practice and procedure. The approach taken below reflects the intent of the IDS Act, which places with the Office of Indigent Defense Services (IDS Office) the responsibility for appointing and compensating counsel in capital cases.

This part is divided into four subparts, corresponding to the major areas requiring attention in capital litigation:

- Appointment and Compensation of Trial Counsel
- Appointment and Compensation of Appellate Counsel
- Appointment and Compensation of Post-Conviction Counsel
 - Appointment and Compensation of Experts and Others Providing Services Related to Legal representation

This part also includes an appendix containing standards that attorneys must meet to be considered for appointment as trial, appellate, or post-conviction counsel in capital cases.

The rules are authorized by Chapters 7A and 15A of the North Carolina General Statutes (G.S.), and by the IDS Act. The rules supercede the provisions on capital representation in Section D. of the Rules and Regulations of the North Carolina State Bar (State Bar Rules) and any provisions on

capital representation in local bar plans issued pursuant to the State Bar Rules. As of July 1, 2001, those rules, which were authorized by former G.S. 7A-459, are no longer effective.

Whenever the term "IDS Director" is used in these rules and appendix, it means the Director of the Office of Indigent Defense Services or his or her designee. Whenever the term "IDS Office" is used in these rules and appendix, it means the Office of Indigent Defense Services or its designee. Whenever the term "IDS Commission" is used in these rules and appendix, it means the Commission on Indigent Defense Services or its designee.

These rules may be changed by the IDS Commission pursuant to its authority. (Adopted July 1, 2001.)

Subpart 2B. Appointment and Compensation of Appellate Counsel in Capital Cases.

Rule 2B.2. Appointment of Appellate Counsel.

(a) *Provisional Appointment of the Office of the Appellate Defender.* In extraordinary circumstances and in the absence of a court appointment pursuant to paragraph 2B.2(b) below, the Appellate Defender may appoint the Office of the Appellate Defender on a provisional basis to make a preliminary determination of the defendant's entitlement to appointed counsel in the Appellate Division, and to file a petition for an appropriate extraordinary writ in the Appellate Division.

(b) *Appointment of the Office of Appellate Defender by the Court.* Following entry of a judgment imposing a death sentence, the IDS Director shall appoint the Office of Appellate Defender as appellate counsel in the capital case, and in any joined non-capital case upon which the court enters judgment, if the court determines that the capital defendant is indigent. It shall not be necessary for the IDS Director to file an order appointing the Office of Appellate Defender. The appellate entries made by the court following entry of a death judgment against an indigent defendant shall reflect that appeal is taken by operation of law pursuant to G.S. 15A-2000(d)(1), and that the IDS Director has appointed the Office of Appellate Defender. The appellate entries shall be mailed or transmitted by facsimile to the Office of Appellate Defender as soon as practicable following entry of judgment.

(c) *Representation by Appellate Defender; Assignment of Other Appellate Counsel.* The Appellate Defender shall represent on appeal as many of the defendants with capital appeals as possible to maximize the effectiveness of the Office of Appellate Defender, consistent with the other goals and responsibilities of that office. For the defendants that the Office of Appellate Defender does not represent on appeal, the Appellate Defender shall appoint one or two lawyers to represent the defendant on appeal. The Appellate Defender shall maintain a list of lawyers eligible to represent capital defendants on appeal pursuant to the procedures in Appendix 2B to these rules. The Appellate Defender shall appoint from that list pursuant to rules approved by the IDS Director. Appointment orders, signed by the Appellate Defender, shall be distributed to the appellant, trial judge, prosecuting attorney, defense attorneys at trial, clerk of superior court for the county where the trial took place, and court reporter(s).

(d) *Conflicts.* If the Office of Appellate Defender is appointed to represent a capital defendant whose case would create a conflict of interest with a current or previous client of the office of Appellate Defender, the Appellate Defender shall immediately notify the IDS Director, and the IDS Director shall appoint counsel in the new case pursuant to the rules under which the Appellate Defender would appoint counsel. If the Office of Appellate Defender is

appointed to represent two or more clients between whom there is a conflict of interest, the Appellate Defender shall immediately notify the IDS Director, and the IDS Director shall appoint counsel in all cases in which a conflict exists.

(e) *Evidentiary Hearings on Remand from the Appellate Courts Pending Direct Appeal and Assignment of Counsel by the Appellate Defender.* After consulting with appointed appellate counsel, the Appellate Defender or IDS Director may appoint one or two additional lawyers to represent the appellant at an evidentiary hearing in the Trial Division on remand from the Appellate Division when the direct appeal is still pending. If additional counsel is appointed for that purpose, that counsel must be on the roster of attorneys who are approved to represent indigent capital defendants in the Trial Division pursuant to Rule 2A.2(d)(App.). Compensation of counsel appointed under this subsection shall be governed by Rule 2B.3. Appointment and compensation of experts and payment of other expenses related to litigation at the evidentiary hearing as authorized under this subsection shall be governed by Part 2D of these rules. (Adopted July 1, 2001; amended July 9, 2004; Subsection (c) amended effective November 4, 2005; New subsection (e) adopted November 4, 2005.)

Commentary:

Subsection (e): This provision was added in November 2005 to authorize the Appellate Defender or IDS Director to appoint counsel to

litigate an evidentiary hearing in the Trial Division on remand from the Appellate Division when the direct appeal is still pending.

Appendix to Part 2.

Appendix 2A. Standards for Lead and Associate Trial Counsel in Capital Cases.

Rule 2A.2. (App.) Applications.

(a) *Application.* An attorney who seeks to be appointed as lead or associate counsel in a capital case shall submit to the IDS Director an application on a form prescribed by the IDS Director. The application shall require the attorney to demonstrate that he or she has fully satisfied the requirements set forth above. The attorney shall specify for which Judicial Division roster(s) of qualified lead counsel and associate counsel he or she seeks to be considered. The attorney shall also identify any requirement(s) that he or she requests be waived, and shall set forth in detail his or her trial experience or other exceptional qualifications that justify waiver.

(b) *Required Submissions.* In support of an application, an attorney shall submit to the IDS Director:

(i) a list of all first-degree murder cases in which the attorney has appeared within the past five years, including the name of the case, the county, the trial judge, the prosecuting attorney, any co-counsel, the result or verdict, and any reported appellate decision in the case;

(ii) at least two examples of substantial written legal work product prepared by the attorney at the trial or appellate level in connection with separate felony cases;

(iii) a description of specialized criminal defense training programs attended within the past five years, such as those sponsored by the North Carolina Academy of Trial lawyers, the North Carolina Bar Association, or the Center for Death Penalty Litigation;

(iv) the names, addresses, and phone numbers of two superior court judges, two prosecutors, and two defense attorneys familiar with the attorney's work as an advocate; and

(v) any additional material that may assist the IDS Director in evaluating the applicant's trial qualifications and experience.

(c) *Waiver or Deferral of Required Submissions.* If an attorney has not provided each of the above items, the IDS Director, upon determination that the attorney has the required legal knowledge and skill necessary for representation as lead or associate counsel in a capital case, and will apply that knowledge and skill with appropriate thoroughness and preparation as either lead or associate counsel, may either waive such submission(s) or defer submission of any item(s) for a reasonable time and in the interim place the attorney on the roster of qualified lead or associate counsel.

(d) *Creation of Capital Trial Roster.* Following review of each application to determine that it is complete, the IDS Director will investigate the contents of the submission, contact references, and determine whether the attorney is qualified for appointment as lead or associate counsel in a capital case. The IDS Director shall thereafter create and maintain a roster of attorneys qualified for and willing to accept appointments as lead and associate counsel in each Judicial Division.

(e) *Appeal to the IDS Commission.* If the IDS Director determines that an attorney is not qualified for appointment as lead or associate counsel in a capital case or otherwise declines to place the attorney's name on the capital trial roster, the attorney may make a written request for a review of the IDS Director's decision from a committee of the IDS Commission designated by the IDS Commission to conduct such review. (Adopted July 1, 2001; Subsection (e) amended effective February 10, 2006.)

Rule 2A.3. (App.) Retention and Eligibility.

(a) *On-Going Training.* To remain eligible for appointment as lead or associate counsel in a capital case, an attorney must attend capital training sessions as prescribed by the IDS Director, and consult regularly and frequently with the IDS Director with respect to each capital case to which the attorney is appointed.

(b) *Removal from Roster.* The IDS Director may remove from the roster of attorneys qualified for appointment as lead or associate counsel in a capital case any attorney who has ignored requirements for appointment as lead or associate counsel; has failed to continue to demonstrate that he or she has the required legal knowledge and skill necessary for representation as lead or associate counsel; or has failed to continue to demonstrate that he or she is willing to apply that knowledge and skill with appropriate thoroughness and preparation as lead or associate counsel. The IDS Director may also remove an attorney from a roster if, as part of a periodic review of the roster, the IDS Director determines that a smaller roster of attorneys will better serve the goals of ensuring the best possible representation of indigent capital defendants and of delivering quality services in the most efficient and cost-effective manner. If the IDS Director removes an attorney from the capital trial roster, the attorney may make a written request for a review of the IDS Director's decision from a subcommittee of the IDS Commission designated by the IDS Commission to conduct such review. (Adopted July 1, 2001; Subsection (b) amended effective February 10, 2006.)

Appendix 2B. Standards for Appellate Counsel in Capital Cases.

Rule 2B.2. (App.) Applications.

(a) *Application.* An attorney who seeks to be appointed as appellate counsel in a capital case shall submit to the Appellate Defender an application on a

form prescribed by the IDS Director. The application shall require the attorney to demonstrate that he or she has fully satisfied the requirements set forth above. The attorney shall also identify any requirement(s) that he or she requests be waived, and shall set forth in detail his or her appellate experience or other exceptional qualifications that justify waiver.

(b) *Required Submissions.* In support of an application, an attorney shall submit to the Appellate Defender:

(i) at least two appellate briefs, written exclusively or primarily by the applicant, the opposing briefs, and the appellate court's decision;

(ii) a description of specialized capital or other criminal appellate advocacy, or other criminal practice program, attended in the past five years;

(iii) the names, addresses, and phone numbers of two prosecutors and two defense attorneys, current or former, including at least one appellate adversary, who are familiar with the applicant's work as an advocate; and

(iv) any additional material that may assist the IDS Director in evaluating the applicant's appellate qualifications and experience.

The applicant may submit the name, address, and phone number of one appellate judge, if the judge is familiar with the applicant's work as an advocate.

(c) *Waiver or Deferral of Required Submissions.* If an attorney has not provided each of the above items, the IDS Director, upon determination that the attorney has the required legal knowledge and skill necessary for representation as appellate counsel in a capital case, and will apply that knowledge and skill with appropriate thoroughness and preparation as appellate counsel, may either waive such submission(s) or defer submission of any item(s) for a reasonable time and in the interim place the attorney on the roster of qualified appellate counsel.

(d) *Creation of Capital Appeals Roster.* Following review of each application to determine that it is complete, the Appellate Defender will investigate the contents of the submission, contact references, and make any further investigation deemed necessary. The Appellate Defender shall then make a recommendation to the IDS Director as to whether the attorney is qualified for appointment as appellate counsel in a capital case. The IDS Director shall make the final determination as to whether an attorney should be included on the capital appeals roster. The Appellate Defender shall thereafter create and maintain a roster of attorneys qualified for and willing to accept appointments as appellate counsel.

(e) *Appeal to the IDS Commission.* If the IDS Director determines that an attorney is not qualified for appointment as appellate counsel in a capital case or otherwise declines to place the attorney's name on the capital appeals roster, the attorney may make a written request for a review of the IDS Director's decision from a committee of the IDS Commission designated by the IDS Commission to conduct such review. (Adopted July 1, 2001; Subsection (e) amended effective February 10, 2006.)

Rule 2B.3. (App.) Retention and Eligibility.

(a) *On-Going Training.* To remain eligible for appointment as counsel on a capital appeal, an attorney must attend and successfully complete training sessions as prescribed by the Appellate Defender, and consult regularly and frequently with the Appellate Defender with respect to each capital case to which the attorney is appointed.

(b) *Removal from Roster.* The IDS Director may remove from the roster of attorneys qualified for appointment as appellate counsel in a capital case any attorney who has ignored requirements for appointment as appellate counsel; has failed to continue to demonstrate that he or she has the required legal

knowledge and skill necessary for representation as appellate counsel; or has failed to continue to demonstrate that he or she is willing to apply that knowledge and skill with appropriate thoroughness and preparation as appellate counsel. The IDS Director may also remove an attorney from the roster if, as part of a periodic review of the roster, the IDS Director determines that a smaller roster of attorneys will better serve the goals of ensuring the best possible representation of indigent capital defendants and of delivering quality services in the most efficient and cost-effective manner. If the IDS director removes an attorney from the capital appeals roster, the attorney may make a written request for a review of the IDS Director's decision from a subcommittee of the IDS Commission designated by the IDS Commission to conduct such review. (July 1, 2001; Subsection (b) amended effective February 10, 2006.)

Rule 2C.2. (App.) Applications.

(a) *Application.* An attorney who seeks to be appointed as post-conviction counsel in a capital case shall submit to the IDS Director an application on a form prescribed by the IDS Director. The application shall require the attorney to demonstrate that he or she has fully satisfied the requirements set forth above. The attorney shall also identify any requirement(s) that he or she requests be waived, and shall set forth in detail his or her criminal or civil litigation, appellate and/or post-conviction experience, or other exceptional qualifications that justify waiver.

(b) *Required Submissions.* In support of an application, an attorney shall submit to the IDS Director:

(i) at least two examples of substantial written legal work product prepared by the attorney in connection with separate cases, or at least two appellate briefs, written exclusively or primarily by the applicant, the opposing briefs, and the appellate court's decision in the case;

(ii) a description of specialized trial, appellate, or post-conviction capital defense training programs attended in the past five years;

(iii) the names, addresses, and phone numbers of two prosecutors and two defense attorneys, current or former, including at least one adversary, who are familiar with the applicant's work as an advocate; and

(iv) any additional material that may assist the IDS Director in evaluating the applicant's post-conviction qualifications and experience.

The applicant may submit the name, address, and phone number of one judge, if the judge is familiar with the applicant's work as an advocate.

(c) *Waiver or Deferral of Required Submissions.* If an attorney has not provided each of the above items, the IDS Director, upon determination that the attorney has the required legal knowledge and skill necessary for representation as post-conviction counsel in a capital case, and will apply that knowledge and skill with appropriate thoroughness and preparation as post-conviction counsel, may either waive such submission(s) or defer submission of any item(s) for a reasonable time and in the interim place the attorney on the roster of qualified post-conviction counsel.

(d) *Creation of Post-Conviction Roster.* Following review of each application to determine that it is complete, the IDS Director will investigate the contents of the submission, contact references, and determine whether the attorney is qualified for appointment as post-conviction counsel in a capital case. The IDS Director shall thereafter create and maintain a roster of attorneys qualified for and willing to accept appointments as post-conviction counsel.

(e) *Appeal to the IDS Commission.* If the IDS Director determines that an attorney is not qualified for appointment as post-conviction counsel in a capital case or otherwise declines to place the attorney's name on the capital post-conviction roster, the attorney may make a written request for a review of

the IDS Director's decision from a committee of the IDS Commission designated by the IDS Commission to conduct such review. (Adopted July 1, 2001; Subsection (e) amended effective February 10, 2006.)

Rule 2C.3. (App.) Retention and Eligibility.

(a) *On-Going Training.* To remain eligible for appointment as counsel on an initial Motion for Appropriate relief and any appeal therefrom, an attorney must attend and successfully complete capital training sessions as prescribed by the IDS Director, and consult regularly and frequently with the IDS Director with respect to each capital case to which the attorney is appointed.

(b) *Removal from Post-Conviction Roster.* The IDS Director may remove from the roster of attorneys qualified for appointment as post-conviction counsel in a capital case any attorney who has ignored requirements for appointment as post-conviction counsel; has failed to continue to demonstrate that he or she has the required legal knowledge and skill necessary for representation as post-conviction counsel; or has failed to continue to demonstrate that he or she is willing to apply that knowledge and skill with appropriate thoroughness and preparation as post-conviction counsel. The IDS Director may also remove an attorney from the roster if, as part of a periodic review of the roster, the IDS Director determines that a smaller roster of attorneys will better serve the goals of ensuring the best possible representation of indigent capital defendants and of delivering quality services in the most efficient and cost-effective manner. If the IDS Director removes an attorney from the capital post-conviction roster, the attorney may make a written request for a review of the IDS director's decision from a subcommittee of the IDS Commission designated by the IDS Commission to conduct such review. (Adopted July 1, 2001; Subsection (b) amended effective February 10, 2006.)

PART 3

RULES FOR PROVIDING LEGAL REPRESENTATION IN NON-CAPITAL CRIMINAL APPEALS AND NON- CRIMINAL APPEALS

This third part addresses the procedure to be followed when a person is entitled to appointed counsel on appeal to the Appellate Division from adverse decisions in the Trial Division in both non-capital criminal proceedings and non-criminal proceedings. The rules are authorized by the Indigent Defense Services Act of 2000 (IDS Act), S.L. 2000-144, Senate Bill 1323, and apply to cases pending on or after July 1, 2001. Fee applications for appellate representation filed on or after that date will be governed by these rules.

The rules supercede the provisions on appellate representation in Section D. of the Rules and Regulations of the North Carolina State Bar (State Bar Rules) and any provisions on appellate representation in local bar plans issued pursuant to the State Bar Rules. As of July 1, 2001, those rules, which were authorized by former G.S. 7A-459, are no longer effective.

Whenever the term "IDS Director" is used in these rules, it means the Director of the Office of Indigent Defense Services or his or her designee. Whenever the term "IDS Office" is used in these rules, it means the Office of Indigent Defense Services or its designee. Whenever the term "IDS Commission" is used in these rules, it means the Commission on Indigent Defense Services or its designee.

These rules may be changed by the IDS Commission pursuant to its authority. (Adopted July 1, 2001; amended November 15, 2002.)

Rule 3.2. Appointment of Appellate Counsel.

(a1) *Provisional Appointment of the Office of the Appellate Defender to File a Petition for an Extraordinary Writ.* In extraordinary circumstances and in the absence of a court appointment pursuant to paragraph 3.2(b) below, the Appellate Defender may appoint the Office of the Appellate Defender, or an attorney on the roster of counsel who are qualified and willing to accept appointment to represent persons in the Appellate Division, on a provisional basis to make a preliminary determination of the person's entitlement to appointed counsel in the Appellate Division, and to file a petition for an appropriate extraordinary writ in the Appellate Division.

(a2) *Provisional Appointment of the Office of the Appellate Defender in Proceedings Under Subchapter I of Chapter 7B of the General Statutes.* In the absence of a court appointment pursuant to paragraph 3.2(b) below, when the Appellate Defender is notified by trial counsel of an appealable ruling adverse to the respondent in an action brought under Subchapter I of Chapter 7B of the General Statutes, the Appellate Defender may appoint the Office of the Appellate Defender, or an attorney on the roster of counsel who are qualified and willing to accept appointment to represent persons in the Appellate Division, on a provisional basis to make a preliminary determination of the respondent's entitlement to appointed counsel in the Appellate Division, and to represent the respondent in contemplation of an appeal, or to consult with trial counsel and the respondent on the decision of whether to enter notice of appeal.

(b) *Appointment of the Office of Appellate Defender by the Court.* When a person enters notice of appeal in a case subject to this part, the court shall appoint the Office of Appellate Defender to represent the person in the Appellate Division, except that, in cases subject to G.S. 122C-270(e) and 122C-289, the district court shall appoint as appellate counsel of record the attorney who represented the person in district court. These rules, including provisions relating to standards and compensation, govern all other aspects of appointment of counsel appointed under the foregoing exception.

(c) *Transmittal of Judgment and Forms.* Following the appointment of the Office of Appellate Defender to represent a person in a case subject to this part, the clerk of superior court shall immediately send to the Office of Appellate Defender, by United States mail or by facsimile, a copy of the judgment or decree from which the appeal was taken, as well as any written appellate entries or rulings the court makes with respect to the appeal.

(d) *Assignment of Counsel by the Appellate Defender.* If the Appellate Defender determines that, to insure quality appellate representation, a person's appeal should not be assigned to the Office of Appellate Defender, the Appellate Defender shall assign the person's case to private counsel or a public defender or assistant public defender listed on the roster of qualified appellate counsel maintained by the Appellate Defender pursuant to paragraph 3.4 below and rules approved by the IDS Director. Such counsel is thereafter appellate counsel of record.

(e) *Conflicts.* If the Office of Appellate Defender is appointed to represent a person whose case would create a conflict of interest with a current or previous client of the Office of Appellate Defender, the Appellate Defender shall immediately notify the IDS Director, and the IDS Director shall appoint counsel in the new case pursuant to the rules under which the Appellate Defender would appoint counsel. If the Appellate Defender is appointed to represent co-appellants, the Appellate Defender may appoint the Office of the Appellate Defender to represent a co-appellant and may appoint counsel for the remaining co-appellants so long as the Appellate Defender previously has not undertaken representation of a co-appellant.

(f) *Notice of Assignment and Request for Record.* Following the Appellate Defender's decision to assign an appeal to other counsel, or following the IDS

Director's assignment of counsel in case of a conflict, the assigning authority shall immediately notify assigned counsel of the appointment, and shall also notify the clerk of superior court, the court reporter(s) or other custodian(s) of the recorded proceedings, and the adverse parties of the name, address, and telephone number of assigned counsel. The Office of Appellate Defender shall transmit to assigned appellate counsel a copy of the documents forwarded to the Office of Appellate Defender by the clerk of superior court pursuant to paragraph 3.2(b) above, and shall request that the clerk transmit to assigned counsel the complete file maintained by the clerk in the case.

(g1) *Litigation of Non-Capital Motions for Appropriate Relief Pending Direct Appeal and Assignment of Counsel by the Appellate Defender.* Appellate counsel appointed pursuant to Part 3 of these rules who seeks to be compensated for preparing, filing, or litigating a non-capital Motion for Appropriate Relief ("MAR") pending direct appeal pursuant to G.S. 15A-1418 must obtain prior authorization from the Appellate Defender. If the Appellate Defender declines to authorize MAR litigation, appointed appellate counsel may seek authorization from the IDS Director. After consulting with appointed appellate counsel, the Appellate Defender or IDS Director may appoint one additional counsel to represent the appellant for purposes of preparing, filing, or litigating an MAR. If additional counsel is appointed to prepare, file, or litigate the MAR, that counsel must be on a roster of counsel in some North Carolina jurisdiction who are qualified to represent defendants at trial charged with the highest offense the appellant has appealed, or a higher offense. Compensation of counsel appointed under this subsection shall be governed by Rule 3.3. Appointment and compensation of experts and payment of other expenses related to MAR litigation authorized under this subsection shall be governed by Part 2D of these rules.

(g2) *Evidentiary Hearings on Remand from the Appellate Courts Pending Direct Appeal and Assignment of Counsel by the Appellate Defender.* After consulting with appointed appellate counsel, the Appellate Defender or IDS Director may appoint one additional lawyer to represent the appellant at an evidentiary hearing in the Trial Division on remand from the Appellate Division when the direct appeal is still pending. If additional counsel is appointed for that purpose in a criminal case, that counsel must be on a roster of counsel in some North Carolina jurisdiction who are qualified to represent indigent defendants in the Trial Division charged with the highest offense that is being remanded, or a higher offense. If additional counsel is appointed for that purpose in a case brought under Chapter 7B of the General Statutes, that counsel must be on a roster of counsel in some North Carolina jurisdiction who are qualified to represent indigent persons in the Trial Division in the applicable type of case. Compensation of counsel appointed under this subsection shall be governed by Rule 3.3. Appointment and compensation of experts and payment of other expenses related to litigation at the evidentiary hearing as authorized under this subsection shall be governed by Part 2D of these rules.

(h) *Litigation of Motions to Modify Dispositional Orders Pending Direct Appeal in Juvenile Delinquency Cases and Assignment of Counsel by the Appellate Defender.* Appellate counsel appointed to a juvenile delinquency case pursuant to Part 3 of these rules who seeks to be compensated for preparing, filing, or litigating a motion to modify a dispositional order pending direct appeal pursuant to G.S. 7B-2600 must obtain prior authorization from the Appellate Defender. If the Appellate Defender declines to authorize the litigation, appointed appellate counsel may seek authorization from the IDS Director. After consulting with appointed appellate counsel and the Juvenile Defender, the Appellate Defender or IDS Director may appoint one additional counsel to represent the appellant for purposes of preparing, filing, or litigat-

ing a motion to modify a dispositional order. If additional counsel is appointed to prepare, file, or litigate the motion, that counsel must be on a roster of counsel in some North Carolina jurisdiction who are qualified to represent juveniles in district court delinquency proceedings charged with the highest offense the appellant has appealed, or a higher offense. Compensation of counsel appointed under this subsection shall be governed by Rule 3.3. Appointment and compensation of experts and payment of other expenses related to the motion to modify the dispositional order authorized under this subsection shall be governed by Part 2D of these rules. (Adopted July 1, 2001; Subsection (d) amended effective January 18, 2002; Subsection (f) adopted effective November 15, 2002; New subsection (a1) adopted effective July 9, 2004; New Subsection (g1) adopted effective November 15, 2002; New subsection (g2) adopted effective November 4, 2005; New subsection (h) adopted effective July 8, 2005; New subsection (a2) adopted effective February 10, 2006.)

Commentary:

Subsection (a1): This provision was added in July 2004 to authorize the Appellate Defender to provisionally appoint the Office of the Appellate Defender or a private appellate attorney in certain circumstances. The need for this authority has typically arisen in three types of cases: 1) cases in which the Appellate Defender believes that a trial court has erroneously denied indigency status after a person who the court previously determined was indigent entered notice of appeal, and that a petition for an extraordinary writ should be filed on the person's behalf; 2) cases in which a trial court has determined that a person is indigent but denied appointed appellate counsel, and the Appellate Defender believes that the person has a right to appointed appellate counsel and that a petition for an extraordinary writ should be filed on the person's behalf; and 3) cases in which the Appellate Defender is contacted by appointed trial counsel concerning the need for immediate review of a pre-trial ruling, and the Appellate Defender agrees that the ruling should be chal-

lenged in the appellate courts by means of a petition for an extraordinary writ.

Subsection (a2): This provision was added in February 2006 to authorize the Appellate Defender to provisionally appoint the Office of the Appellate Defender or a private appellate attorney on a provisional basis in proceedings brought under Subchapter I of Chapter 7B of the General Statutes. The need for this authority arose when the Supreme Court of North Carolina adopted Rule 3A of the North Carolina Rules of Appellate Procedure, which is designed to expedite appeals in abuse, neglect, or dependency and termination of parental rights cases.

Subsection (g1): This provision was added in November 2002 to authorize the Appellate Defender or IDS Director to appoint counsel to litigate a non-capital motion for appropriate relief pending direct appeal.

Subsection (g2): This provision was added in November 2005 to authorize the Appellate Defender or IDS Director to appoint counsel to litigate an evidentiary hearing in the Trial Division on remand from the Appellate Division when the direct appeal is still pending.

Rule 3.4. Standards for Appellate Counsel.

(a) *Maintenance of Roster.* The Appellate Defender shall maintain a roster of attorneys who are qualified and willing to accept appointment by the Appellate Defender or IDS Director to represent persons in the Appellate Division pursuant to these rules.

(b) *Qualifications.* To be eligible for appointment to represent persons in the Appellate Division, an attorney must demonstrate that he or she is proficient in legal writing and oral advocacy, has the required legal knowledge and skill necessary for appellate representation, and will apply that knowledge and skill with appropriate thoroughness and preparation.

(c) *Submission of Application.* An attorney who desires to be on the roster of qualified appellate counsel shall submit to the Appellate Defender an application on a form prescribed by the Appellate Defender, accompanied by the following materials:

- (i) a complete resume of the applicant's educational and legal experience;

(ii) four samples of the applicant's legal writing, which may include pleadings, memoranda of law, or appellate briefs;

(iii) three letters of recommendation from attorneys licensed in North Carolina for five or more years, or from professors of law familiar with the applicant's legal writing and oral advocacy skills;

(iv) unless the applicant is currently serving as the Appellate Defender or an Assistant Appellate Defender, a listing of three cases in which the applicant represented an appellant to judgment in the Appellate Division; and

(v) any additional materials that may assist the Appellate Defender in evaluating the applicant's appellate qualifications and experience.

(d) *Waiver*. If an attorney cannot supply one or more of the submissions set forth in paragraph (c), the Appellate Defender, upon demonstration that the attorney has the required legal knowledge and skill necessary for representation as appellate counsel, and will apply that knowledge and skill with appropriate thoroughness and preparation, may either waive such submission(s) or defer such submission(s) for a reasonable time and in the interim place the attorney on the roster of qualified appellate counsel.

(e) *Review of Application and Creation of Appellate Roster*. Following receipt of the application to be on the roster of qualified appellate counsel, the Appellate Defender shall consider the submitted materials, conduct such investigation as is appropriate, and determine whether the attorney is qualified for appointment as appellate counsel in a non-capital criminal or non-criminal case. The Appellate Defender shall notify the applicant in writing whether he or she will be placed on the roster of qualified appellate counsel. If the Appellate Defender determines that an attorney is not qualified for appointment as appellate counsel in a non-capital criminal or non-criminal case or otherwise declines to place the attorney's name on the appellate roster, the attorney may make a written request for a review of the Appellate Defender's decision from a committee of the IDS Commission designated by the IDS Commission to conduct such review.

(f) *Conditions of Appointment*. The Appellate Defender or IDS Director may set additional conditions of appointment, including requiring attorneys appointed under this subpart to:

(i) consult with the Appellate Defender or his or her designee during the pendency of the representation, participate in practice oral arguments, and submit briefs for pre-filing review, as required by the Appellate Defender;

(ii) promptly notify the Appellate Defender by mail, facsimile, or email upon the filing of each brief or substantive motion or memorandum in the case, include in the notification a copy of the Questions Presented in each brief, and upon request by the appellate Defender, transmit to the Appellate Defender a copy of the entire brief, motion, or memorandum, or portions thereof; and

(iii) meet with the Appellate Defender or his or her designee following an appellate decision and prior to final payment of counsel fees to review the course of the representation.

(g) *Retention of Eligibility*. To remain eligible for appointment as counsel in a non-capital criminal or non-criminal appeal, an attorney must attend and successfully complete any training sessions prescribed by the Appellate Defender. (Adopted July 1, 2001; Subsection (e) amended effective February 10, 2006.)

Rule 3.6. Removal from Roster.

Following consultation with the IDS Director, the Appellate Defender may remove from the roster of attorneys qualified for appointment as appellate counsel any attorney who has ignored requirements for appointment as appellate counsel; has failed to continue to demonstrate that he or she has the

required legal knowledge and skill necessary for representation as appellate counsel; or has failed to continue to demonstrate that he or she is willing to apply that knowledge and skill with appropriate thoroughness and preparation as appellate counsel. Following consultation with the IDS Director, the Appellate Defender may also remove an attorney from the roster if, as part of a periodic review of the roster, the Appellate Defender determines that a smaller roster of attorneys will better serve the goals of ensuring the best possible appellate representation of indigent persons and of delivering quality services in the most efficient and cost-effective manner. If the Appellate Defender removes an attorney from the appellate roster, the attorney may make a written request for a review of the Appellate Defender's decision from a subcommittee of the IDS Commission designated by the IDS Commission to conduct such review. (Adopted July 1, 2001; Amended effective February 10, 2006.)

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Amendments through March 1, 2006.

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IV. Meetings of the commission.	IX. Investigation and review of applications for certification denied or revoked for reasons other than those pertaining to ethics and conduct.
VII. Mediator conduct.	
VIII. Investigation and review of matters of ethical conduct, character, and fitness to practice; conduct of hearings; sanctions.	Index follows Rules.

Rule IV. Meetings of the commission.

A. *Meeting Schedule.* The Commission shall meet at least twice each year pursuant to a schedule set by the Commission and in special sessions at the call of the Chair or other officer acting for the Chair.

B. *Quorum.* A majority of Commission members shall constitute a quorum. Decisions shall be made by a majority of the members present and voting except that decisions to dismiss complaints or impose sanctions pursuant to Rule VIII of these Rules or to deny certification or certification renewal or to revoke certification pursuant to Rule IX of these Rules shall require an affirmative vote consistent with those Rules.

C. *Public meetings.* All meetings of the Commission for the general conduct of business and minutes of such meetings shall be open and available to the public except that meetings, portions of meetings or hearings conducted pursuant to Rules VIII and IX of these Rules may be closed to the public in accordance with those Rules.

D. *Matters requiring immediate action.* If, in the opinion of the Chair, any matter requires a decision or other action before the next regular meeting of the Commission and does not warrant the call of a special meeting, it may be referred to the Executive Committee. The Executive Committee may consider the matter and vote or take other action as appropriate by correspondence, telephone, facsimile, or other practicable method; provided, all formal action taken by the Executive Committee is reported to the Commission and included in the minutes of Commission proceedings.

Rule VII. Mediator conduct.

The conduct of all mediators, mediation trainers and managers of mediation training programs must conform to the Standards of Professional Conduct for Mediators adopted by the Supreme Court and enforceable by the Commission and the standards of any professional organization of which such person is a member that are not in conflict nor inconsistent with the Standards. A certified mediator shall inform the Commission of any criminal conviction, any complaint filed against or disciplinary action imposed upon the mediator by any other professional organization, or any judicial sanction. Failure to do so is a violation of these Rules. Violations of the Standards or other professional standards or any conduct otherwise discovered reflecting a lack of moral character or fitness to conduct mediations or which discredits the Commission, the courts or the mediation process may subject a mediator to disciplinary proceedings by the Commission.

Rule VIII. Investigation and review of matters of ethical conduct, character, and fitness to practice; conduct of hearings; sanctions.**A. *Establishment of the Standing Committee on Standards, Discipline, and Advisory Opinions.***

1. *Establishment of Committee.* The Chair of the Commission shall appoint a standing Committee on Standards, Discipline, and Advisory Opinions (Committee) to review the matters set forth in Section 2 below. Members of the Committee shall recuse themselves from deliberating on any matter in which they cannot act impartially or about which they have a conflict of interest.

2. *Matters to Be Considered by Committee.* The Committee shall review and consider the following matters:

a. appeals of staff decisions to deny an application filed by a person seeking certification as a mediator or filed by a person seeking recertification as a mediator based upon the person's conduct, character, or fitness to practice;

b. appeals of staff decisions to deny an application filed by a person or entity seeking certification or recertification as a mediator training program based upon the person's conduct, character, or fitness to practice or that of a trainer or program manager of the mediator training program;

c. complaints which are filed by a member of the Commission, its staff, or any member of the public about a mediator, an applicant for mediator certification or renewal of certification, a mediation trainer, or a mediator training program manager (affected person) based upon the affected person's conduct, character, or fitness to practice: and

d. the drafting of advisory opinions pursuant to the Commissions's Advisory Opinion Policy.

3. *The Investigation of Violations of the Standards of Conduct.*

a. *Information Obtained During the Process of Certification or Renewal.* Commission staff shall review all pending grievances, disciplinary matters, judicial sanctions, and convictions reported by certified mediators, by applicants for mediator certification or certification renewal and by trainers or managers affiliated with mediator training programs applying for certification or certification renewal. Commission staff may contact those reporting to request additional information and may consider any other information acquired during the investigation process that bears on the applicant, mediator, or training program's eligibility for certification or certification renewal. Staff shall forward all such matters of eligibility to the Committee for review except those matters expressly exempted from review by the *Guidelines for Reviewing Pending Grievances/Complaints, Disciplinary Actions Taken and Convictions* (Guidelines) adopted by the Committee and approved by the Commission.

b. *Complaints of mediator misconduct filed with the Commission.* The staff of the Commission shall forward written complaints about the conduct of an applicant, mediator, trainer, or training program manager filed by any member of the general public, the Commission, or its staff to the committee for investigation. Copies of such complaints shall be forwarded by certified U.S. mail, return receipt requested, to the affected person.

However, in instances where Commission staff believes a complaint to be wholly without merit, the Executive Director shall refer the matter to the committee's chair rather than to the committee as set forth above. If after giving the complaint due consideration, the chair also believes that the complaint is wholly without merit, the complaint shall be dismissed with notification to the complaining party. The complaining party shall have thirty (30) days from the date of notification to appeal the chair's determination to the full Committee on Standards, Discipline, and Advisory Opinions.

c. *Investigation by the Standing Committee.* The Committee shall investigate all matters brought before it by staff pursuant to the provisions of

subsection a. or b. and may contact the following persons and entities for information concerning such application or complaint: the affected person or applicant, State Bar officials, officials of other professional licensing bodies to whom the affected person is subject, parties or other individuals who brought complaints against the mediator or applicant, court officials, and any other person or entity who may have additional information about the matters reported or facts alleged. The Chair or his/her designee may issue subpoenas for the attendance of witnesses and for the production of books, papers, or other documentary evidence deemed necessary or material to any such investigation.

All information in Commission files pertaining to the initial certification of a mediator or mediation training program or renewals of such certifications, to requests for informal or formal guidance from the Commission pursuant to the Advisory Opinion Policy, and to pending complaints shall be confidential.

d. *Probable Cause Determination.* The Committee on Standards, Discipline, and Advisory Opinions shall deliberate to determine whether probable cause exists to believe that the conduct of the affected person or applicant:

i) is inconsistent with good moral character (MSC Rule 8.E. FFS Rule 8.F. and Rule VII above);

ii) is a violation of the Supreme Court's Standards of Professional Conduct for Mediators or any other standards of professional conduct that are not in conflict with nor inconsistent with the Supreme Court's Standards and to which the mediator, applicant, trainer or manager is subject (Rule VII above);

iii) is a violation of the rules for the Mediated Settlement Conference, Family Financial Settlement, or Pre-litigation Farm Nuisance Mediation Programs;

iv) is a violation of MSC Rule 9 or FFS Rule 9 or guidelines and other policies adopted by the Commission that amplify those rules;

v) reflects a lack of fitness to conduct mediations or to serve as a trainer or training program manager and/or (Rule VII above); or

vi) discredits the Commission, the courts, or the mediation process (Rule VII above).

If there is a finding of probable cause, that the affected person or applicant shall be sanctioned pursuant to these rules.

4. *Authority of Committee to Dismiss Complaints or Propose Sanctions.*

a. If a majority of Committee members reviewing a matter finds no probable cause pursuant to Section A.3.d. above, Commission staff shall certify or recertify the affected person or applicant without conditions or, if the investigation were initiated by the filing of a written complaint, shall dismiss the complaint and notify the complaining party and the affected person by certified U.S. mail, return receipt requested, that no further action will be taken and that the matter is dismissed. There shall be no right of appeal from the Committee's decision to dismiss a complaint or certify an affected person or applicant.

b. If a majority of Committee members reviewing a matter finds probable cause pursuant to Section A.3.d. above, the Committee shall propose sanctions on the affected person or applicant as set forth in Section B.10. of these rules, except that if the Committee determines that the violation of the Standards or rules is technical or minor in nature, that the complaining party was not significantly harmed and that the Commission, courts or programs were not discredited, the Committee may elect to caution the affected person or applicant rather than imposing sanctions. The Committee's findings, conclusions, and proposed sanctions or any letter of caution shall be in writing and forwarded to the affected person or applicant by U.S. mail, return receipt requested.

c. If sanctions are proposed, the affected person or applicant may appeal the findings and/or proposed sanctions to the Commission within thirty (30) days

from the date of the letter transmitting the Committee's findings and its proposed sanctions. Notification of appeal must be in writing. If no appeal is filed within thirty (30) days, the affected person or applicant shall be deemed to have accepted the Committee's findings and proposed sanctions and said sanctions shall commence.

5. *Disputes between mediators and complainants.* Commission staff may attempt to resolve any disputes between a complaining party and an affected person in which the conduct of the affected person does not constitute a violation of the grounds set out in Section A.3.d. above.

B. *Appeal to the Commission.*

1. *The commission shall meet to consider appeals.* An appeal of the Committee's determination pursuant to Section A.3.d. above shall be heard by the members of the Commission, except that all members of the Committee who participated in issuing the determination that is on appeal shall be recused and shall not participate in the Commission's deliberations. No matter shall be heard and decided by less than three Commission members. Members of the Commission shall recuse themselves when they cannot act impartially. Any challenges raised by the appealing party or any other party questioning the neutrality of a member shall be decided by the Commission's chair.

2. *Conduct of the hearing.*

a. At least thirty (30) days prior to the hearing before the Commission, Commission staff shall forward to all parties, special counsel to the Commission, and members of the Commission who will hear the matter, copies of all documents considered by the Committee and summaries of witness interviews and/or character recommendations.

b. Hearings conducted by the Commission pursuant to this rule shall be a *de novo* review of the Committee's decision.

c. Complainants, applicants, and affected persons may appear at the hearing with or without counsel.

d. All hearings will be open to the public except that for good cause shown the presiding officer may exclude from the hearing room all persons except the parties, counsel, and those engaged in the hearing. No hearing will be closed to the public over the objection of an applicant or affected person.

e. In the event that the complainant, affected person, or applicant fails to appear without good cause, the Commission shall proceed to hear from those parties and witnesses who are present and make a determination based on the evidence presented at the proceeding.

f. Proceedings before the Commission shall be conducted informally but with decorum.

g. The Commission, through its counsel, and the applicant or affected person may present evidence in the form of sworn testimony and/or written documents. The Commission, through its counsel, and the applicant or affected person may cross-examine any witness called to testify by the other. Commission members may question any witness called to testify at the hearing. The Rules of Evidence shall not apply, except as to privilege, but shall be considered as a guide toward full and fair development of the facts. The Commission shall consider all evidence presented and give it appropriate weight and effect.

h. The Commission's chair or designee shall serve as the presiding officer. The presiding officer shall have such jurisdiction and powers as are necessary to conduct a proper and speedy investigation and disposition of the matter on appeal. The presiding officer may administer oaths and may issue subpoenas for the attendance of witnesses and the production of books, papers, or other documentary evidence.

3. *Date of Hearing.* An appeal of any sanction proposed by the Committee shall be heard by the Commission within ninety (90) days of the date the sanction is imposed.

4. *Notice of Hearing.* The Commission's office shall serve on all parties by certified U.S. mail, return receipt requested, notice of the date, time, and place of the hearing no later than sixty (60) days prior to the hearing.

5. *Ex Parte Communications.* No person shall have any *ex parte* communication with members of the Commission concerning the subject matter of the appeal. Communications regarding scheduling matters shall be directed to Commission staff.

6. *Attendance.* All parties, including complaining parties, applicants and parties against whom sanctions are proposed, shall attend in person. The presiding officer may, in his or her discretion, permit an attorney to represent a party by telephone or through video conference or to allow witnesses to testify by telephone or through video conference with such limitations and conditions as are just and reasonable. If an attorney or witness appears by telephone or video conference, the Commission's staff must be notified at least twenty (20) days prior to the proceeding. At least five (5) days prior to the proceeding, the Commission's staff must be provided with contact information for those who will participate by telephone or video conference.

7. *Witnesses.* The presiding officer shall exercise discretion with respect to the attendance and number of witnesses who appear, voluntarily or involuntarily, for the purpose of ensuring the orderly conduct of the proceeding. Each party shall forward to the Commission's office at least ten (10) days prior to the hearing the names of all witnesses who will be called to testify.

8. *Transcript.* The Commission shall retain a court reporter to keep a record of the proceeding. Any Party who wishes to obtain a transcript of the record may do so at his/her own expense by contacting the court reporter directly. The only official record of the proceeding shall be the one made by the court reporter retained by the Commission. Copies of tapes alone, non-certified transcripts therefrom, or a record made by a court reporter retained by a party are not part of the official record.

9. *Commission Decision.* After the hearing, a majority of the Commission members hearing the appeal may: (i) find that there is not clear and convincing evidence to support the imposition of sanctions and, therefore, dismiss the complaint or direct the Commission staff to certify or recertify the mediator or mediator training program, or (ii) find that there is clear and convincing evidence that grounds exist to impose sanctions and impose sanctions. The Commission shall set forth its findings, conclusions, and sanctions, or other action, in writing and serve its decision on the parties within sixty (60) days of the date of the hearing.

10. *Sanctions.* The sanctions that may be proposed by the Committee or imposed by the Commission include, but are not limited to, the following:

- a. Private, written admonishment;
- b. Public, written admonishment;
- c. Completion of additional training;
- d. Restriction on types of cases to be mediated in the future;
- e. Reimbursement of fees paid to the mediator or training program;
- f. Suspension for a specified term;
- g. Probation for a specified term;
- h. Certification or renewal of certification upon conditions;
- i. Denial of certification or certification renewal;
- j. Decertification; and/or
- k. Prohibition on participation as a trainer or manager of a certified mediator training program either indefinitely or for a period of time.

11. *Publication of Committee/Commission Decisions.*

a. Names of mediators who are reprimanded privately or applicants who have never been certified and have been denied certification shall not be published in the Commission's newsletter and on its web site.

b. Names of mediators who are sanctioned under any other provision of Section B.10. above and who have been denied reinstatement under Section B.13. below shall be published in the Commission's newsletter and on its web site along with a short summary of the facts involved and the discipline imposed. For good cause shown, the Commission may waive this requirement.

c. Chief District Court Judges and/or Senior Resident Superior Court Judges in districts which the mediator serves, the NC State Bar and any other professional licensing/certification bodies to which the mediator is subject, and other trial forums or agencies having mandatory programs and using mediators certified by the Commission shall be notified of any sanction imposed upon a mediator except those named in Subsection a. above.

d. If the Commission imposes sanctions as a result of a complaint filed by a third party, the Commission's office shall, on request, release copies of the complaint, response, counter response, and Commission/Committee decision.

12. *Appeal.* The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions imposing sanctions or denying applications for mediator or mediator training program certification. An order imposing sanctions or denying applications for mediator or mediator training program certification shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal shall be filed within thirty (30) days of the date of the Commission's decision.

13. *Reinstatement.* A mediator, trainer, or manager who has been sanctioned under this rule may be reinstated as a certified mediator or as an active trainer or manager pursuant to Section B.13.g, below. Except as otherwise provided by the Standing Committee or Commission, no application for reinstatement may be tendered within two years of the date of the sanction or denial.

a. A petition for reinstatement shall be made in writing, verified by the petitioner, and filed with the Commission's office.

b. The petition for reinstatement shall contain:

- i) the name and address of the petitioner;
- ii) the offense or misconduct upon which the suspension or decertification or the bar to training or program management was based; and
- iii) a concise statement of facts claimed to justify reinstatement as a certified mediator or a trainer or program manager.

c. The petition for reinstatement may also contain a request for a hearing on the matter to consider an additional evidence which the petitioner wishes to put forth, including any third party testimony regarding his or her character, competency, or fitness to practice as a mediator, trainer, or manager.

d. The Commission's staff shall refer the petition to the Commission for review.

e. If the petitioner does not request a hearing, the Commission shall review the petition and shall make a decision within sixty (60) days of the filing of the petition. That decision shall be final. If the petitioner requests a hearing, it shall be held within ninety (90) days of the filing of the petition. The Commission shall conduct the hearing, consistent with Section B above. At the hearing, the petitioner may:

- i) appear personally and be heard;
- ii) be represented by counsel;
- iii) call and examine witnesses;
- iv) offer exhibits; and
- v) cross-examine witnesses.

f. At the hearing, the Commission may call witnesses, offer exhibits, and examine the petitioner and witnesses.

g. The burden of proof shall be upon the petitioner to establish by clear and convincing evidence:

i) that the petitioner has rehabilitated his/her character, addressed and resolved any conditions which led to his/her suspension or decertification, completed additional training in mediation theory and practice to ensure his/her competency as a mediator, trainer, or manager, and/or taken steps to address and resolve any other matter(s) which led to the petitioner's suspension, decertification, or prohibition from serving as a trainer or manager; and
ii) the petitioner's certification will not be detrimental to the Mediated Settlement Conference and/or Family Financial Settlement Programs, the Commission, the courts, or the public interest; and

iii) that the petitioner has completed any paperwork required for reinstatement and paid any required reinstatement and/or certification fees.

h. If the petitioner is found to have rehabilitated him or herself and is fit to serve as a mediator, trainer, or manager, the Commission shall reinstate the petitioner as a certified mediator or as an active trainer or manager. However, if the suspension or decertification or the bar to training or management has continued for more than two years, the reinstatement may be conditioned upon the completion of additional training and observations as needed to refresh skills and awareness of program rules and requirements.

i. The Commission shall set forth its decision to reinstate a petitioner or to deny reinstatement in writing, making findings of fact and conclusions of law, and serve the decision on the petitioner by U.S. mail, return receipt requested, within thirty (30) days of the date of the hearing.

j. If a petition for reinstatement is denied, the petitioner may not apply again pursuant to this section until two years have lapsed from the date the denial was issued.

k. The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions to deny reinstatement. An order denying reinstatement shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal shall be filed within thirty (30) days of the date of the Commission's decision.

Rule IX. Investigation and review of applications for certification denied or revoked for reasons other than those pertaining to ethics and conduct.

A. Establishment of the Standing Committee on Certification of Mediators and Mediator Training Programs.

1. *Establishment of Committee.* The Chair of the Commission shall appoint a standing Committee on Certification of Mediators and Mediator Training Programs (Committee) to review the matters set forth in Section 2 below. Members of the Committee shall recuse themselves from deliberating on any matter in which they cannot act impartially or about which they have a conflict of interest.

2. *Matters to Be Considered by Committee.* The Committee shall review and consider the following matters:

a. Appeals of staff decisions to deny an application filed by a person seeking mediator certification or recertification or by a mediator training program seeking certification or recertification, because of deficiencies that do not relate to conduct or ethics. The latter deficiencies shall be considered pursuant to Rule 8.

b. Complaints which are filed by a member of the Commission, its staff, or any member of the public about a certified mediator or certified mediator training program or an applicant for certification or certification renewal; except that, complaints relating to applicant, mediator, trainer or manager conduct or ethics shall be considered only pursuant to Rule 8.

3. *The Investigation of Qualifications.*

a. *Information obtained during the process of certification or renewal.* Commission staff shall review all pending applications for certification and recertification to determine whether the applicant meets the non-ethics related qualifications set out in the MSC Rules 8 and 9 and FFS Rules 8 and 9 and any guidelines or other policies adopted by the Commission amplifying those rules. Commission staff may contact those reporting to request additional information and may consider any other information acquired during the investigation process that bears on the applicant's eligibility for certification or certification renewal.

b. *Complaints about mediator or mediator training program qualifications filed with the Commission.* The staff of the Commission shall forward written complaints about the qualifications of a certified mediator or certified mediator training program or any trainer or manager affiliated with such program (affected person/program that do not pertain to ethics or conduct filed by any member of the general public, the Commission, or its staff to the Committee for investigation. Copies of such complaints shall be forwarded by certified U.S. mail, return receipt requested, to the affected person.

However, in instances where Commission staff believes a complaint to be wholly without merit the Executive Director shall refer the matter to the Committee's chair rather than to the Committee as set forth above. If after giving the complaint due consideration, the chair also believes that the complaint is wholly without merit, the complaint shall be dismissed with notification to the complaining party. The complaining party shall have thirty (30) days from the date of notification to appeal chair's determination to the full Committee on Certification of Mediators and Mediator Training Programs. The appeal shall be in writing and directed to the Commission's office.

c. *Investigation by the Standing Committee.* The Committee shall investigate all matters brought before it by staff pursuant to the provisions of Sections a. or b. The Chair or designee may issue subpoenas for the attendance of witnesses and for the production of books, papers, or other documentary evidence deemed necessary or material to any such investigation. The Chair or designee may contact the following persons and entities for information concerning such application or complaint:

i) all references, employers, colleges, and other individuals and entities cited in applications for mediator certification, including any and all other professional licensing or certification bodies to which the applicant is subject.

ii) all proposed trainers cited in training program applications and in the case of applications for certification renewal, participants who have completed the training program.

iii) all parties bringing complaints about a mediator or a mediator training program's qualifications for certification or certification renewal and any other person or entity with information about the subject of the complaint.

All information in Commission files pertaining to the initial certification of a mediator or mediation training program or to renewals of such certifications shall be confidential.

d. *Probable Cause Determination.* The Committee on Certification of Mediators and Mediator Training Programs shall deliberate to determine whether probable cause exists to believe that the affected person/program or the applicant:

i) does not meet the qualifications for mediator certification set out in MSC Rule 8 and/or FFS Rule 8 or guidelines and other policies adopted by the Commission that amplify those rules; or

ii) does not meet the qualifications for mediator training program certification as set out in MSC rule 9 and/or FFS Rule 9 or guidelines and other policies adopted by the Commission that amplify those rules.

If probable cause is found that the application for certification or recertification should be denied or the affected person/program's certification should be revoked.

4. *Authority of Committee to Deny Certification or Certification Renewal or to Revoke Certification.*

a. If a majority of Committee members reviewing a matter finds no probable cause pursuant to Section A.3.d. above, Commission staff shall certify or recertify the affected person/program or applicant. If the investigation were initiated by the filing of a written complaint, the Committee shall dismiss the complaint and notify the complaining party and the affected person/program or applicant in writing by certified U.S. mail, return receipt requested, that the complaint has been dismissed and that the affected person/program or applicant will be certified or re-certified. There shall be no right of appeal from the Committee's decision to dismiss a complaint or to certify or re-certify an affected person/program or applicant.

b. If a majority of Committee members reviewing a matter finds probable cause pursuant to Section A.3.d. above, the Committee shall deny certification or recertification or revoke certification. The Committee's findings, conclusions, and denial shall be in writing and forwarded to the affected person/program or applicant by U.S. mail, return receipt requested.

c. If the Committee denies certification or re-certification or revokes certification, the affected person/program or applicant may appeal the denial or revocation to the Commission within thirty (30) days from the date of the letter transmitting the Committee's findings, conclusions, and denial. Notification of appeal must be in writing and directed to the Commission's office. If no appeal is filed within thirty (30) days, the affected person/program or applicant shall be deemed to have accepted the committee's findings and denial or revocation.

B. *Appeal of the denial to the Commission.*

1. *The Commission Shall Meet.* An appeal of a denial or revocation by the Committee pursuant to Section A.3.d. above shall be heard by the members of the Commission, except that all members of the Committee who participated in issuing the determination that is on appeal shall recuse themselves from participating. No matter shall be heard and decided by less than three Commission members. Members of the Commission shall recuse themselves when they cannot act impartially. Any challenges raised by the appealing party or any other party questioning the neutrality of a member shall be decided by the Commission's chair.

2. *Conduct of the Hearing.*

a. At least thirty (30) days prior to the hearing before the Commission, Commission staff shall forward to all parties: special counsel to the Commission, if appointed: and members of the Commission who will hear the matter, copies of all documents considered by the Committee and summaries of witness interviews and character recommendations.

b. Hearings conducted by the Commission will be a *de novo* review of the Committee's decision.

c. The Commission's chair or his/her designee shall serve as the presiding officer. The presiding officer shall have such jurisdiction and powers as are necessary to conduct a proper and speedy investigation and disposition of the matter on appeal. The presiding officer may administer oaths and may issue subpoenas for the attendance of witnesses and the production of books, papers, or other documentary evidence.

d. Special counsel supplied either by the Attorney General at the request of the Commission or employed by the Commission may present the evidence in support of the denial or revocation of certification. Commission members may question any witnesses called to testify at the hearing.

e. The Commission, through its counsel, and the applicant or affected person/program may present evidence in the form of sworn testimony and/or

written documents. The Commission, through its counsel and the applicant or affected person/program, may cross-examine any witness called to testify at the hearing. The Rules of Evidence shall not apply, except as to privilege, but shall be considered as a guide toward full and fair development of the facts. The Commission shall consider all evidence presented and give it appropriate weight and effect.

f. All hearings shall be conducted in private, unless the applicant or affected person/program requests a public hearing.

g. In the event that the complainant, affected person/program, or applicant fails to appear without good cause, the Commission shall proceed to hear from those parties and witnesses who are present and make a determination based on the evidence presented at the proceeding.

h. Proceedings before the Commission shall be conducted informally but with decorum.

3. *Date of Hearing.* An appeal of any denial by the Committee shall be heard by the Commission within ninety (90) days of the date of the letter transmitting the Committee's findings, conclusions, and denial or revocation.

4. *Notice of Hearing.* The Commission's office shall serve on all parties by certified U.S. mail, return receipt requested, notice of the date, time, and place of the hearing no later than sixty (60) days prior to the hearing.

5. *Ex Parte Communications.* No person shall have any *ex parte* communication with members of the Commission concerning the subject matter of the appeal. Communications regarding scheduling matters shall be directed to Commission staff.

6. *Attendance.* All parties including complaining parties and applicants, or their representatives in the case of a training program, shall attend in person. The presiding officer may, in his or her discretion, permit an attorney to represent a party by telephone or through video conference or to allow witnesses to testify by telephone or through video conference with such limitations and conditions are just and reasonable. If an attorney or witness appears by telephone or video conference, the Commission's staff must be notified at least twenty (20) days prior to the proceeding. At least five (5) days prior to the proceeding, the Commission's staff must be provided with contact information for those who will participate by telephone or video conference.

7. *Witnesses.* The presiding officer shall exercise his/her discretion with respect to the attendance and number of witnesses who appear, voluntarily or involuntarily, for the purpose of ensuring the orderly conduct of the proceeding. Each party shall forward to the Commission's office at least ten (10) days prior to the hearing the names of all witness who will testify for them.

8. *Transcript.* The Commission shall retain a court reporter to keep a record of the proceeding. Any party who wishes to obtain a transcript of the record may do so at his or her own expense by contacting the court reporter directly. The only official record of the proceeding shall be the one made by the court reporter retained by the Commission. Copies of tapes alone, non-certified transcripts therefrom, or a record made by a court reporter retained by a party are not part of the official record.

9. *Commission Decision.* After the hearing, a majority of the Commission members hearing the appeal may: (i) find that there is not clear and convincing evidence to support the denial or revocation and therefore dismiss the complaint or direct the Commission staff to certify or recertify the mediator or mediator training program; or (ii) find that there is clear and convincing evidence to affirm the committee's findings and denial or revocation. The Commission shall set forth its findings, conclusions, and denial in writing and serve it on the parties within sixty (60) days of the date of the hearing.

10. *Publication of Committee/Commission Decisions.*

a. Names of applicants for mediator certification or names of mediator training programs that are denied certification or recertification or who have

had their certification revoked pursuant to this rule shall not be published in the Commission's newsletter or on its web site and the fact of that denial or revocation shall not be generally publicized.

b. Chief District Court Judges and/or Senior Resident Superior Court Judges in districts which the mediator serves, the NC State Bar and any other professional licensing/certification bodies to which the mediator is subject, and other trial forums or agencies having mandatory programs and using mediators certified by the Commission shall be notified of any denial or revocation of certification.

11. *Appeals.* The General Court of Justice Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions denying an application or revoking a certification. An order denying or revoking certification pursuant to this rule shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal shall be filed within thirty (30) days of the date of the Commission's decision.

12. *Reinstatement of Certification.* A mediator or training program whose certification renewal has been denied or whose certification has been revoked under this rule may be re-certified or reinstated as a certified mediator or mediation training program pursuant to Section B.12.g. below. An application for reinstatement may be tendered at any time the applicant believes that he/she/it is qualified to be reinstated.

a. A petition for reinstatement shall be made in writing, verified by the petitioner, and filed with the Commission's office.

b. The petition for reinstatement shall contain:

- i) the name and address of the petitioner;
- ii) the qualification upon which the denial or revocation was based; and
- iii) a concise statement of facts claimed to justify certification or recertification as a certified mediator or mediator training program.

c. The petition for reinstatement or certification may also contain a request for a hearing on the matter to consider any additional evidence that the petitioner wishes to put forth.

d. The Commission's staff shall refer the petition to the Commission for review.

e. If the petitioner does not request a hearing the Commission shall review the petition and shall make a decision within sixty (60) days of the filing of the petition. That decision shall be final. If the petitioner requests a hearing, it shall be held within ninety (90) days of the filing of the petition. The Commission shall conduct the hearing consistent with Section B above. At the hearing, the petitioner may:

- i) appear personally and be heard;
- ii) be represented by counsel;
- iii) call and examine witnesses;
- iv) offer exhibits; and
- v) cross-examine witnesses.

f. At the hearing the Commission may call witnesses, offer exhibits, and examine the petitioner and witnesses.

g. The burden of proof shall be upon the petitioner to establish by clear and convincing evidence:

- i) that the petitioner has satisfied the qualifications that led to the denial or revocation; and
- ii) that the petitioner has completed any paperwork required for reinstatement and paid any required reinstatement and/or certification fees.

h. If the petitioner is found to have met the qualifications and is entitled to be certified as a mediator or mediator training program, the Commission shall so certify.

i. If a petition for reinstatement is denied, the petitioner may apply again pursuant to this section at any time after the qualifications are met.

j. The Commission shall set forth its decision to certify a mediator or mediator training program or to deny certification in writing, making findings of fact and conclusions of law, and serve the decision on the petitioner by U.S. mail, return receipt requested, within thirty (30) days of the date of the hearing.

k. The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions to deny reinstatement. An order denying reinstatement shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of review shall be filed with the Superior Court in Wake County within thirty (30) days of the date of the Commission's decision.

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RULES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

CIVIL RULES

Rule 1.1. Scope and citation of local rules.

CASE NOTES

Cited in Rich Food Servs. v. Rich Plan Corp.,
— F. Supp. 2d —, 2002 U.S. Dist. LEXIS 27791
(E.D.N.C. June 17, 2002).

Rule 7.1. Motion practice.

CASE NOTES

Failure to File Supporting Memoranda.
— In an insurer's declaratory judgment suit, the insured's motion to change venue was denied; the insured failed to follow U.S. Dist. Ct., E.D. N.C., R. 7.1 by not supporting his motion with a memorandum detailing the legal reasons supporting his motion. *Nationwide Mut. Ins. Co. v. McMahon*, 365 F. Supp. 2d 671, 2005 U.S. Dist. LEXIS 6709 (E.D.N.C. 2005).

Motion to Compel Was Denied As Untimely Filed. — Defendants' motion to compel

was denied because the motion was untimely filed after the deadline prescribed in former U.S. Dist. Ct., E.D. N.C., W. Div., Civ. R. 4.01. The court declined to exercise its discretion and allow the untimely motion, pursuant to Fed. R. Civ. P. 6(b)(2), because defendants failed to comply with the Fed. R. Civ. P. 37(a)(2)(A) good faith conferral requirement and no excusable neglect was shown. *Rich Food Servs. v. Rich Plan Corp.*, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 27791 (E.D.N.C. June 17, 2002).

RULES OF THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

Revised effective April 3, 2006.

Rule

3070-1. Return of Plan Payments to Debtor.

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Rule 3070-1. Return of Plan Payments to Debtor.

a. *Return of plan payments to debtor:* Upon conversion or dismissal of a chapter 13 case prior to confirmation, and unless the court orders otherwise, the standing trustee shall return to the debtor any payments made by the debtor under the proposed plan, less any claim under 11 U.S.C. 503(b).

b. *Adequate protection payments to secured creditors and direct payments to lessors.*

1. The debtor shall pay directly to the lessor all payments scheduled in a lease of personal property for that portion of the obligation that becomes due after the order for relief.

2. Unless the chapter 13 plan ("Plan") provides that the entire secured claim is to be paid directly by the debtor to the creditor, the debtor shall pay to a creditor, who holds an allowed claim secured by personal property to the extent that the claim is attributable to the purchase of the property by the debtor, pre-confirmation adequate protection payments through the chapter 13 trustee; however, the court may order payments to be made by any other method.

3. The presumptive adequate protection payment to be paid pursuant to Section 1326(a)(1) shall be at least one percent (1%) of the value of the subject collateral at the discretion of the Chapter 13 trustee as of the petition date. The valuation of the collateral shall be made solely by the Chapter 13 trustee, subject to further court consideration.

4. All adequate protection payments paid through the Chapter 13 trustee shall be subject to an administrative fee in favor of the trustee equal to the trustee's statutory percentage commission then in effect, and the trustee shall collect the fee at the time of the distribution of the adequate protection payment to the claimant.

5. The Chapter 13 trustee shall make adequate protection payments to the creditor at the address duly noted on the proof of claim. The use of the address shall be deemed proper notice of the creditors for purpose of the adequate protection payments.

6. The Chapter 13 trustee shall not be required to make pre-confirmation adequate protection payments on account of any claim for which the secured value of the claim is less than \$2,000.00.

7. All adequate protection payments made through the Chapter 13 trustee shall be disbursed in the ordinary course of the trustee's business, according to the trustee's standard monthly distribution schedule, from funds in the case as they become available for distribution to claimants prior to or after entry of the Order Confirming Plan.

8. Upon the dismissal or conversion of the Chapter 13 case to another chapter prior to confirmation, the Chapter 13 trustee shall make the pre-

confirmation adequate protection payments, or portion thereof, from any funds available for that purpose received on or before the date of the entry of the order of dismissal or conversion, to creditors that have filed proofs of claim that have been deemed allowed pursuant to Section 502(a), prior to the date of the dismissal or conversion.

9. Subsections (b)(2) and (b)(3) of this rule shall not apply if the adequate protection is provided by means other than by direct payments to the holder of the secured claim.

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ADEQUATE PROTECTION PAYMENTS.
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C

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3070-1.

LOCAL RULES OF CIVIL, CRIMINAL, AND BANKRUPTCY PRACTICE OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

PART I. LOCAL RULES OF CIVIL PRACTICE

Rule LR6.1. Extensions of time and continuances of hearings.

CASE NOTES

Applied in *Sutton v. Cree, Inc.*, 386 F. Supp. 2d 600, 2005 U.S. Dist. LEXIS 24912 (M.D.N.C. June 22, 2005).

Excusable neglect. — Software company's motion to extend the time to respond to telecommunication company's motion for summary judgment beyond the expiration of the previously granted extension of time, and its motion for leave to file an over-long response brief was denied because, there was no excusable neglect, as required by Fed. R. Civ. P. 6(b) and

U.S. Dist. Ct., M.D. N.C., Civ., Crim. & Bankr. R. 6.1(a), in the software company's failure to timely file its opposition brief, during the time for extension, counsel refused to consult with the district court or opposing counsel about the delay, and when the brief was filed, it was vastly over the 20-page limit. *Madison River Mgmt. Co. v. Business Mgmt. Software Corp.*, 387 F. Supp. 2d 521, 2005 U.S. Dist. LEXIS 26267 (M.D.N.C. Aug. 31, 2005).

Rule LR7.3. Motion practice.

CASE NOTES

Reply Brief Violated Rule. —

In an employment discrimination case, a 36-page table set out by the employee in her response to the employer's motion for summary judgment was stricken because the table set out facts that were material and in dispute, and thus, the material should have been included within the summary judgment response brief and kept within the page limit specified in U.S. Dist. Ct., M.D.N.C., R. 7.3(d). *Youse v. Duke Energy Corp.*, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 26573 (M.D.N.C. Dec. 15, 2003).

Failure to Respond. —

Pursuant to U.S. Dist. Ct., M.D. N.C., R. 7.3(k) and Fed. R. Civ. P. 6(b), a postal employee was deemed to have waived his right to respond to a Fed. R. Civ. P. 12(b)(6) dismissal motion because he had not filed a response within 30 days as required by U.S. Dist. Ct., M.D. N.C., R. 7.3, his counsel failed to seek leave to file an untimely response despite three inquiries from the court concerning the matter, the Postmas-

ter General, who was sued in the action, was prejudiced by the delay, and the employee could not establish excusable neglect to justify the granting of an extension of time to respond. *Daye v. Potter*, 380 F. Supp. 2d 718, 2005 U.S. Dist. LEXIS 14716 (M.D.N.C. 2005).

Although the court could simply grant a Fed. R. Civ. P. 12(b)(6) dismissal motion, because it was deemed uncontested under U.S. Dist. Ct., M.D.N.C., R. 7.3(k) after a postal employee failed to timely respond to the motion, the court nevertheless exercised its discretion, considered the substance of the employee's complaint, and determined that he had failed to state actionable Family Medical Leave Act (FMLA), 29 U.S.C.S. § 2601 et. seq., and Title VII of the Civil Rights Act of 1964 claims. *Daye v. Potter*, 380 F. Supp. 2d 718, 2005 U.S. Dist. LEXIS 14716 (M.D.N.C. 2005).

Applied in *Sutton v. Cree, Inc.*, 386 F. Supp. 2d 600, 2005 U.S. Dist. LEXIS 24912 (M.D.N.C. June 22, 2005).

Rule LR54.2. Award of statutory attorney's fees.**CASE NOTES**

Consultation Requirement. — Following remand of a removed state action by former employees and their spouses against a financial advisor and its employees, and an award of costs and fees to the former employees and spouses, the parties were ordered, pursuant to U.S. Dist. Ct., M.D. N.C., Civ. R. 54.2, to consult and attempt to agree on the amount of the just

costs and expenses incurred by the former employees and spouses as a result of the second removal, which would include only those costs and expenses, including reasonable attorneys' fees, associated with the second removal. *McPhatter v. Sweitzer*, 401 F. Supp. 2d 468, 2005 U.S. Dist. LEXIS 29840 (M.D.N.C. 2005).

Rule LR56.1. Summary judgment motions.**CASE NOTES****Length of Briefs.** —

In an employment discrimination case, a 36-page table set out by the employee in her response to the employer's motion for summary judgment was stricken because the table set out facts that were material and in dispute, and thus, the material should have been included within the summary judgment response brief and kept within the page limits specified in U.S. Dist. Ct., M.D.N.C., R. 56.1(c) and U.S. Dist. Ct., M.D.N.C., R. 7.3(d). *In re Moore*, 11 N.C. App. 320, 181 S.E.2d 118 (1971).

Software company's motion to extend the time to respond to a telecommunication company's motion for summary judgment beyond the expiration of the previously granted extension of time and its motion for leave to file an over length response brief was denied because (1) pursuant to Fed. R. Civ. P.6(b) and U.S. Dist. Ct., M.D. N.C., Civ., Crim. & Bankr. R. 6.1(a), the district court could find no excusable neglect in the software company's failure to timely file its opposition brief because, although defense counsel was aware of the deadlines, his noncompliance, and its ramifications, he chose not to comply with the district court's

deadlines; (2) during the time for extension, counsel refused to consult with the district court or opposing counsel about the delay; and (3) when the brief was filed, it was vastly over the 20-page limit imposed by U.S. Dist. Ct., M.D. N.C., Civ., Crim. & Bankr. R.56.1(c), despite having notice that the district court was not keen on lengthy briefs because of its previous denial of telecommunications company's motion. *Madison River Mgmt. Co. v. Business Mgmt. Software Corp.*, 387 F. Supp. 2d 521, 2005 U.S. Dist. LEXIS 26267 (M.D.N.C. Aug. 31, 2005).

Movant's Claim Not Sufficiently Specific to Support Summary Judgment. — Defendant's claim that plaintiff had no proper admissible evidence of damages allegedly caused by defendant was not sufficiently specific to support summary judgment, where defendant did not provide the court with the elements of each of the torts at issue or explain how evidence of damages was essential to each claim, or provide any authority indicating that lack of evidence of damages was a blanket defense to all of the claims. *MCI Constructors v. Hazen & Sawyer, P.C.*, 405 F. Supp. 2d 621, 2005 U.S. Dist. LEXIS 30537 (M.D.N.C. 2005).

PART III. LOCAL RULES OF BANKRUPTCY PRACTICE**III. CLAIMS AND DISTRIBUTION TO CREDITORS AND EQUITY INTEREST HOLDERS; PLANS****Rule LBR3003-1. Chapter 11 claims.****CASE NOTES**

Filing of Proof of Claim Waived Right to Jury Trial. — Creditor lost his right to a jury trial under the Seventh Amendment when he chose to file a proof of claim after the debtor had notified him that his claim was listed as contingent, disputed, or unliquidated, as required

under U.S. Dist. Ct., M.D. N.C., Civ., Crim. & Bankr. R. 3003-1; even though the creditor's proof of claim contained a disclaimer that he did not intend to waive a jury trial, the claim against the bankruptcy estate was integrally related to the allowance or disallowance of that

filed claim and was, thus, equitable in nature and involved public rights rather than private rights. *Anderson v. Brokers, Inc.* (In re Brokers,

Inc.), — Bankr. —, 2005 Bankr. LEXIS 1100 (Bankr. M.D.N.C. June 6, 2005).

IX. GENERAL PROVISIONS

Rule LBR9011-2. Pro se parties.

CASE NOTES

Application to Corporate Debtors. — Appeals filed by a corporate debtor's president challenging bankruptcy court orders effecting the debtor's bankruptcy were dismissed because the debtor could not appear pro se, and

the president, who was not a licensed attorney, could not bring appeals on behalf of the debtor without the appearance of a licensed attorney. *Terry v. Sparrow*, 328 B.R. 442, 2005 U.S. Dist. LEXIS 20067 (M.D.N.C. 2005).

**RULES OF PRACTICE AND PROCEDURE
OF THE UNITED STATES DISTRICT
COURT FOR THE WESTERN
DISTRICT OF NORTH
CAROLINA**

PART I. LOCAL RULES OF CIVIL PROCEDURE

Rule LR7.1. Motions in civil actions.

CASE NOTES

Applied in *State v. Whiteley*, — N.C. App. —,
616 S.E.2d 576, 2005 N.C. App. LEXIS 1795
(2005).

RULES OF PRACTICE AND PROCEDURE OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Effective September 1, 2004, with revisions to Chapter 13 Forms effective February 2006.

Local Forms

Index follows Rules.

Adoption of Interim Bankruptcy Rules. —

On September 22, 2005, the United States Bankruptcy Court for the Western District of North Carolina adopted Interim Bankruptcy Rules amending the Federal Rules of Bankruptcy Procedure to implement the substantive and procedural changes mandated by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Pursuant to 28 U.S.C.S. § 2071, Rule 83 of the Federal Rules of Civil Procedure and Rule 9029 of the Federal Rules of Bankruptcy Procedure, the Interim Rules were adopted in their entirety without change by a majority of the judges of the court, effective

October 17, 2005, and shall remain in effect until further order of the court. For cases and proceedings not governed by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, the Federal Rules of Bankruptcy Procedure and the Local Rules of the Bankruptcy Court for the Western District of North Carolina, other than the Interim Rules, shall apply.

The Interim Bankruptcy Rules may be viewed at the website for the United States Bankruptcy Court for the Western District of North Carolina located at **www.uscourts.gov/rules/interim.html**.

APPENDIX C

LOCAL FORMS

Local Form 1

2002

**UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
_____ DIVISION**

IN RE:

) Case No. _____

) Chapter _____

) **NOTICE OF**

) **OPPORTUNITY FOR HEARING**

) (No-Protest Notice: No Hearing

Tax I.D. No.

) Will Be Held Unless Request

) For Hearing Is Filed)

Debtor(s).

TAKE NOTICE that [name of moving party] has filed papers with the Court to [relief sought in motion or objection]. A copy of these paper(s) are included with this Notice or copied on the reverse side of this Notice.

Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one in this bankruptcy case. If you do not have an attorney, you may wish to consult one.

If you do not want the Court to order [relief sought in motion or objection], or if you want the Court to consider your views on the [motion][objection], then on or before **[DATE RESPONSE DUE]** from the date of this Notice, you or your attorney must do three (3) things:

1. **File with the Court a written response requesting that the Court hold a hearing and explaining your position. File the response at:**

U.S. Bankruptcy Court
[Courtroom #]
[Address]

If you mail your request to the Court for filing, you must mail it early enough so the Court will **receive** it on or before the date stated above.

2. **On or before the date stated above for written responses, you must also mail or fax a copy of your written request to:**

[Name/address/fax # of movant's attorney]

WESTERN DISTRICT BANKRUPTCY RULES

[Name/address/fax # of other parties to be served]

3. **Attend the hearing scheduled for [date], [year], at [time] a.m./p.m. in Courtroom [#], United States Bankruptcy Court, [Court address].**

If you or your attorney do not take these steps, **A HEARING WILL NOT BE HELD**, and the Court may decide that you do not oppose the relief sought in the motion or objection and may enter an order granting that relief.

Date: _____.

[Attorney Name]

[Address]

[Telephone/Fax #s]

[State Bar #]

WESTERN DISTRICT BANKRUPTCY RULES

Local Form 2

Revised 4/22/2003

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
Form for Tender of Order or Judgment

I. Case Name: _____
Base Case No: _____ Chapter: _____ Adv. Proc. #: _____
Adv. Proc. Name: _____
Primary Relief: _____

II. _____ Consent Order _____ Order after "No-Protest Notice" with No
Objection or Response
_____ Ex Parte Order Submitted With Motion
_____ Pursuant to Court's Oral Ruling at Hearing on: _____
_____ Other Order _____

III. _____ No Opposing Counsel or Party
_____ Form of Order Approved by Opposing Counsel
_____ Date Opposing Party/Counsel was Served with Copy of Proposed Order and this Form:

IV. Order will be Tendered to the Court on: _____

V. _____ Return filed order in enclosed self-addressed, stamped envelope to attorney who
prepared order.

VI. Attorney Preparing Order: _____
Address: _____
City, State and Zip: _____
Telephone and Bar Number: _____
Representing: _____

INFORMATION MUST BE COMPLETED IN EACH SECTION (I-VI) OR THE COURT
MAY REJECT THE ORDER AS SUBMITTED

Pursuant to Local Rule 9021-1 form to be tendered with proposed order or judgment.

WESTERN DISTRICT BANKRUPTCY RULES

Local Form 3

2005

Debtor(s) _____

DISCLOSURE TO DEBTOR(S) OF ATTORNEYS FEE PROCEDURE FOR CHAPTER 13 CASES IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

After consultation with the undersigned attorney, you have decided to file a petition for relief under Chapter 13 of the United States Bankruptcy Code. Accordingly, you are hereby given notice that pursuant to the local rules of the Bankruptcy Court, the base fee for a Chapter 13 case is established at \$ _____. Payment of all or part of this fee is included in your payments to the Trustee. The attorney's services included in the base fee are those normally contemplated in a Chapter 13 case. They are as follows:

- | | |
|--|---|
| (a) Preparation and filing of your petition, schedules, supplemental local forms, Chapter 13 Plan, and mailing matrix. | (e) Review of order confirming plan and periodic reports. |
| (b) Drafting and mailing notice to creditors advising of filing of case, including a copy of your Chapter 13 Plan. | (f) Review of Trustee's motion for allowance of claims. |
| (c) Drafting and mailing to you a letter regarding your attendance at the Section 341 meeting and your other responsibilities. | (g) Maintaining custody and control of case files. |
| (d) Preparation for and attendance at Section 341 meeting. | (h) Service of orders on all affected parties. |
| | (i) Verification of your identity and social security number. |
| | (j) Defending objections to confirmation of your Chapter 13 Plan. |

The base fee shall also include the following services to the extent they are requested or reasonably necessary for your effective representation:

- | | |
|---|--|
| (a) Preparation and filing of proofs of claim on your behalf for your creditors. | (l) Responding to your contacts regarding changes in your financial and personal circumstances and advising the Court and the Trustee of the same. |
| (b) Drafting and filing objections to scheduled and unscheduled proofs of claim. | (m) Communicating with you regarding payment defaults, insurance coverage, credit disability, and the like. |
| (c) Assumptions and rejections of unexpired leases and executory contracts. | (n) Obtaining and providing the Trustee with copies of documents relating to lien perfection issues. |
| (d) Preparation for and attendance at valuation hearings. | (o) Notifying creditors of entry of discharge. |
| (e) Motions to transfer venue. | (p) Notifying creditors by certified mail of alleged violations of the automatic stay. |
| (f) Requesting copies of proofs of claim from Trustee. | (q) Drafting and mailing letters regarding voluntary turnover of property. |
| (g) Consultation with you regarding obtaining postpetition credit (no motion filed). | (r) Review of documents in relation to the use or sale of collateral (no motion filed). |
| (h) Motions to avoid liens. | (s) Providing you with a list of answers to frequently asked questions and other routine communications with you. |
| (i) Calculation of plan payment modifications (no motion filed). | |
| (j) Adding creditor addresses to mailing matrix as necessary. | |
| (k) Responding to written creditor contacts regarding plan terms, valuation of collateral, claim amounts, and the like. | |

WESTERN DISTRICT BANKRUPTCY RULES

In some Chapter 13 cases, legal services which are beyond those normally contemplated must be performed. These legal services are not covered by the base fee. These "non-base" services include the following:

- | | |
|---|---|
| (a) Abandonment of property post-confirmation. | (i) Stay violation litigation, including amounts paid as fees by the creditor or other party. |
| (b) Motion for moratorium. | (j) Post-discharge injunction actions. |
| (c) Motion for authority to sell property. | (k) Adversary proceedings. |
| (d) Motion to modify plan. | (l) Wage garnishment orders. |
| (e) Motion to use cash collateral or to incur debt. | (m) Turnover adversaries. |
| (f) Defense of motion for relief from stay or co-debtor stay. | (n) Conversion to Chapter 7. |
| (g) Defense of motion to dismiss filed after confirmation of your plan. | (o) Motions to substitute collateral. |
| (h) Non-base fee requests. | (p) Any other matter not covered by the base fee. |

For such "non-base" services you will be charged on the basis of attorney's time expended at the rate of \$ _____ per hour plus the amount of expenses incurred (such as court fees, travel, long distance telephone, photocopying, postage, etc.). Such "non-base" fees are chargeable only after the same are approved by the Bankruptcy Court. Except as set forth below, before any such fees are charged you will receive a copy of my motion filed in the Court requesting approval of any such "non-base" fees as well as a notice explaining your opportunity to object if you do not agree with the fee applied for. Any fees awarded for "non-base" services will be paid to the undersigned attorney from your payments to the Trustee in the same way as payment of "base" fees. **It is possible that "non-base" fees approved by the Court may cause your payment to the Trustee to be increased, or the term of your Chapter 13 plan extended.** Whether or not a payment increase or an extension will be necessary depends upon the facts of your case. If a payment increase is necessary because of a court-approved "non-base" fee, the Trustee will notify you of the amount of the increase.

In the Court's discretion, a debtor's attorney in a Chapter 13 proceeding may request, in open court, and without any other notice, "non-base" fees for the following services in amounts not exceeding those shown below. Without other notice, the debtor's attorney may also request up to \$1.00 for each item noticed to creditors as expense for postage, copying, and envelopes. These fees may be adjusted (increased) by the Court at a later date, and, if so, those adjusted fees will then be charged.

- | | |
|--|-------|
| (a) Defense of motion to dismiss. | \$200 |
| (b) Motion to modify and order, including motion for moratorium. | \$350 |
| (c) Substitution of collateral. | \$450 |
| (d) Prosecution or defense of motion for relief from stay or co-debtor stay and order. | \$450 |
| (e) Motion for authority to sell property and order. | \$450 |

ACKNOWLEDGMENT

I hereby certify that I have read this notice and that I have received a copy of this notice.

Dated: _____

Debtor's Signature

Dated: _____

Spouse's Signature

I hereby certify that I have reviewed this notice with the debtor(s) and that the debtor(s) have received a copy of this notice.

Dated: _____

Attorney

WESTERN DISTRICT BANKRUPTCY RULES

Local Form 4

Revised 2004

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
_____ DIVISION

NAME:

)
)
)
)
)
)
)
)
)

Case #

Chapter 13

Debtor(s).

CHAPTER 13 PLAN SUMMARY INCLUDING
MOTION(S) FOR VALUATION; MOTION(S) TO AVOID CERTAIN LIENS;
ASSUMPTION AND REJECTION OF EXECUTORY CONTRACTS; AND NOTICE OF
OPPORTUNITY FOR HEARING ON CONFIRMATION OF THE PLAN INCLUDING ALL MATTERS
AS SET FORTH IN THE PLAN

The following is a summary of the Chapter 13 plan proposed by the above-named debtor(s). The plan may include in its provisions certain motions to avoid liens and motions for valuation of collateral securing claims. If any such motions are included in the proposed plan of the debtor(s), they are specifically included in this plan summary.

Your rights may be affected. You should read the plan summary carefully, including any motions contained in the plan, and discuss them with your attorney, if you have one, in this bankruptcy case. If you do not have an attorney, you may wish to consult one.

If you do not want the Court to confirm the proposed plan of the debtor(s), including any of the motions included in the plan, or if you want the Court to consider your views on these matters, then you or your attorney must file with the Court a written objection to confirmation and request for hearing on confirmation at the following address: Clerk, U.S. Bankruptcy Court, P.O. Box 34189, Charlotte, N.C. 28234-4189. Your objection to confirmation and request for hearing must include the specific reasons for your objection, and must be filed with the Court no later than fifteen (15) days following the conclusion of the meeting of creditors. If you mail your objection to confirmation to the Court for filing, you must mail it early enough so that the Court will receive it on or before the deadline stated above. You must also serve a copy of your objection to confirmation on the debtor(s), the attorney for the debtor(s), and the Chapter 13 trustee at their addresses as they are listed in the notice of the meeting of creditors. If any objections to confirmation are filed with the Court, the objecting party will provide written notice of the date, time, and location of the hearing. No hearing will be held unless an objection to confirmation is filed.

If you or your attorney do not take these steps, the Court may decide that you do not oppose the proposed plan of the debtor(s), including any motions contained in the plan, and may enter an order confirming the plan and granting the motions.

WESTERN DISTRICT BANKRUPTCY RULES

CHAPTER 13 PLAN SUMMARY

1. The plan proposes payments of _____ per month for _____ months or for a ____% payout to the general unsecured creditors.
2. From the payments received, the trustee shall make disbursements as follows and in the following order of priority:

a. ADMINISTRATIVE CLAIMS:

- (1) Trustee's fees and costs (up to a maximum of 10%), court costs, and other administrative claims as ordered paid by the court.
- (2) Attorney's fees. The attorney for the debtor has received \$_____ of the total base attorney fee of \$_____. The remainder of the base fee shall be paid through the plan by the trustee in the sum of one-half of the amount of each of the first two plan payments (up to a maximum of \$350.00 attributable to attorney's fees per plan payment) with any balance of the base fee and any allowed non-base fees to be paid through the plan on a pro-rata basis with allowed secured claims.

b. SECURED CLAIMS:

HOLDERS OF SECURED CLAIMS (INCLUDING ANY ARREARAGES ON FULLY SECURED CLAIMS) WHICH ARE FILED WITH THE TRUSTEE SHALL RETAIN THE LIENS SECURING SUCH CLAIMS UNTIL DISCHARGE AND SHALL BE TREATED AND PAID AS SECURED CLAIMANTS TO THE EXTENT OF THE COLLATERAL VALUE SET FORTH IN THE MOTION TO VALUE CLAIMS SET FORTH HEREIN. TO THE EXTENT THAT A CREDITOR'S CLAIM EXCEEDS THE COLLATERAL VALUE, AND THUS THAT CREDITOR'S CLAIM IS UNDERSECURED, IT SHALL BE TREATED AND PAID IN THE SAME MANNER AS GENERAL UNSECURED CLAIMS.

<u>CLAIMANT</u>	<u>CLAIM AMOUNT</u>	<u>COLLATERAL VALUE</u>	<u>UNSECURED PORTION</u>
-----------------	---------------------	-------------------------	--------------------------

c. PRIORITY CLAIMS

The debtor shall make full payment in deferred cash payments of all claims entitled to priority under 11 U.S.C. §§ 507 and 1322. To the extent such claims are not entitled to priority, they shall be treated and paid in the same manner as general unsecured claims.

WESTERN DISTRICT BANKRUPTCY RULES

Local Form 4

Revised 2004

<u>CLAIMANT</u>	<u>PRIORITY AMOUNT</u>	<u>CLAIMANT</u>	<u>PRIORITY AMOUNT</u>
-----------------	------------------------	-----------------	------------------------

d. GENERAL UNSECURED CLAIMS

The plan provides for the pro-rata payment of all non-priority, unsecured claims after payment of all administrative, secured and priority claims as set forth above. If the plan proposes payments for a term of months, the anticipated payout to general unsecured creditors is approximately ____%.

3. Special Plan Terms

a. SEPARATE CLASSIFICATIONS OF UNSECURED CLAIMS

The following general unsecured claims shall be separately classified and paid in full:

<u>CLAIMANT</u>	<u>CLAIM AMOUNT</u>	<u>REASON FOR CLASSIFICATION</u>
-----------------	---------------------	----------------------------------

b. PROPERTY TO BE SURRENDERED

The debtor shall surrender the collateral securing the claims of the following creditors in satisfaction of the secured portion of such creditor's allowed claims. To the extent that the collateral does not satisfy such a creditor's claim, the creditor shall hold a general unsecured claim. All such unsecured deficiency claims must be filed with the trustee to be included for payment.

<u>CLAIMANT</u>	<u>CLAIM AMOUNT</u>	<u>COLLATERAL BEING SURRENDERED</u>
-----------------	---------------------	-------------------------------------

c. LIEN AVOIDANCE

Liens shall be avoided pursuant to 11 U.S.C. §522(f) as set forth herein.

WESTERN DISTRICT BANKRUPTCY RULES

d. EXECUTORY CONTRACTS AND/OR UNEXPIRED LEASES

(1) The following executory contracts and/or unexpired leases shall be **assumed**:

(2) The following executory contracts and/or unexpired leases shall be **rejected**:

e. DIRECT PAYMENTS BY DEBTOR

The debtor(s) will make regular payments directly to the following creditors:

CLAIMANT

MONTHLY PAYMENT

f. PAYMENTS UPON TAX CLAIMS

Any payments made to a taxing authority during the term of the plan from either the trustee, directly from the debtor(s), from a tax refund, or from any source whatsoever shall be applied first to secured tax claims, second to priority tax claims, and last to general unsecured tax claims without priority.

g. OTHER SPECIAL TERMS

4. Effect of Discharge

UPON THE DEBTOR(S)' COMPLETION OF THE CONFIRMED PLAN (AS PROPOSED HEREIN OR AS SUBSEQUENTLY MODIFIED), ALL CLAIMS PROVIDED BY THE PLAN WILL BE DISCHARGED AS PROVIDED FOR IN 11 U.S.C. §1328, INCLUDING THE CANCELLATION OF LIENS WHICH SECURE CLAIMS THAT ARE PAID IN THE PLAN BY PAYMENT OF THE VALUE OF THE SECURED CLAIM (AS SET FORTH HEREIN OR AS DETERMINED AT THE §341 MEETING OF CREDITORS), AND INCLUDING THE CANCELLATION OF LIENS THAT ARE AVOIDED AS PROVIDED FOR HEREIN.

WESTERN DISTRICT BANKRUPTCY RULES

MOTION TO VALUE LIENS

Included in the debtor(s) schedule of debts are purported secured claims as follows:

<u>CREDITOR</u>	<u>DEBT AMOUNT</u>	<u>COLLATERAL</u>	<u>COLLATERAL VALUE</u>	<u>UNDERSECURED AMOUNT</u>
-----------------	--------------------	-------------------	-----------------------------	--------------------------------

The debtor(s) hereby moves the Court pursuant to Rule 3012 of the Federal Rules of Bankruptcy Procedure to value the collateral of each of the above-stated creditors at the collateral value stated. TO THE EXTENT THAT THE AMOUNT OF THE DEBT OF ANY SUCH CREDITOR EXCEEDS THE STATED COLLATERAL VALUE, THE DEBTOR(S) HEREBY MOVES THE COURT THAT SAID DIFFERENCE BE TREATED IN THE CHAPTER 13 PLAN AS A GENERAL UNSECURED CLAIM WITHOUT PRIORITY. THE DEBTOR(S) FURTHER MOVES THE COURT THAT THE LIEN OF EACH CREDITOR LISTED UPON THE COLLATERAL LISTED BE SATISFIED UPON PAYMENT OF THE COLLATERAL VALUE AND THE ISSUANCE OF THE DEBTOR(S)' DISCHARGE.

MOTION TO AVOID NON-POSSESSORY NON-PURCHASE MONEY SECURITY INTEREST IN HOUSEHOLD GOODS AND PERSONAL ITEMS

The debtor(s) is/are indebted to the following creditors in the amount stated. As security for the debt, each such creditor insisted upon, and the debtor(s) executed, a waiver of exemption of certain property, and a security agreement granting said creditor(s) a non-possessory, non-purchase money security interest in household goods which is property delineated by 11 U.S.C. §522(f)(2) and which is held primarily for the personal, family, or household use of the debtor(s) or a dependent of the debtor(s). The debtors(s) believe that a financing statement has been properly recorded evidencing each such creditors(s)' security interest and liens:

<u>CREDITOR</u>	<u>ACCOUNT/I.D.</u>	<u>DEBT AMOUNT</u>	<u>DESCRIPTION OF PROPERTY</u>
-----------------	---------------------	--------------------	------------------------------------

WESTERN DISTRICT BANKRUPTCY RULES

The debtor(s)' interest in any item of property referred to above does not exceed the value claimed exempt. The money so borrowed from each such creditor does not represent any part of the purchase money of any of the articles covered by each such creditor's security agreement. The existence of each such creditors(s) lien on the debtor(s)' household goods and personal items impairs the exemptions to which the debtor(s) would be entitled under 11 U.S.C. §522. The debtor(s) moves the Court for the cancellation and avoidance of the security interest of each such creditor in the debtor(s) personal and household goods, effective upon discharge.

MOTION TO AVOID JUDICIAL LIEN(S)

Judgment(s) were obtained by the creditors listed below in cases before the General Court of Justice of the State of North Carolina, and said Judgments have been recorded in the Public Registry(ies) as follows:

<u>CREDITOR</u>	<u>JUDGMENT BOOK AND PAGE</u>	<u>REGISTRY</u>	<u>JUDGMENT DATE</u>	<u>JUDGMENT LIEN AMOUNT</u>
-----------------	---------------------------------------	-----------------	----------------------	---------------------------------

The above-stated Judgment(s) created lien(s) on the real property in which the debtor(s) has an interest, which real property is more specifically described as _____. The value of the debtor(s)' interest in this real property is _____. The aforesaid lien(s) constitutes judicial lien(s) under 11 U.S.C. §522(f)(1). The property which this judicial lien encumbers is property which the debtor(s) are entitled to exempt under 11 U.S.C. §522 and the claimed amount of this exemption is \$ _____. The existence of this judicial lien impairs the exemption to which the debtor(s) are entitled under 11 U.S.C. §522.

The debtor(s) respectfully moves the Court to issue an order compelling the above-stated creditors to cancel and to avoid their judicial lien(s) upon the real property described herein, effective upon discharge.

GENERAL PROVISIONS

1. To receive payment from the trustee, a secured creditor must file a proof of claim. Secured claims which are not filed within the time period required by Bankruptcy Rule 3002(c) may be disallowed or subordinated to other claims upon further order of the Court.
2. Confirmation of this plan does not bar a party in interest from objecting to a claim which is not filed in accordance with Federal Bankruptcy Rules 3001 or 3002.

WESTERN DISTRICT BANKRUPTCY RULES

3. Unless otherwise ordered, any creditor holding a claim secured by property which is removed from the protection of the automatic stay, whether by judicial action, voluntary surrender, or through operation of the plan, will receive no further distribution from the trustee, unless an itemized proof of claim for any deficiency is filed within 120 days after the removal of the property from the protection of the automatic stay. This also applies to creditors who may claim an interest in, or lien upon, property which is removed from the protection of the automatic stay of another lien holder or release to another lien holder.
4. If a claim is listed in the plan as secured and the creditor files a proof of claim as an unsecured creditor, the creditor shall be treated as unsecured for purposes of distribution of the plan.

I declare under penalty of perjury that the information provided in this Chapter 13 Plan Summary, including Motion(s) for Valuation; Motion(s) to Avoid Certain Liens; and Assumption and Rejection of Executory Contracts; as to all matters set forth herein are true and correct.

Dated _____
Debtor's Signature

Dated _____
Debtor's Signature

I hereby certify that I have reviewed this document with the debtor(s) and that the debtor(s) have received a copy of this document.

Dated _____
Attorney for the Debtor(s)

Attorney Instructions: Request for Certificate of Discharge

A Certificate of Discharge should now be requested electronically by docketing a request in ECF. The requesting party no longer needs to prepare the Local Form 5 prior to docketing. The new event can be accessed under **Bankruptcy/Other/Request for Certificate of Discharge**.

Follow the steps below to request a certificate of discharge.

STEP 1 Access the Bankruptcy Events List. (See Figure 1)

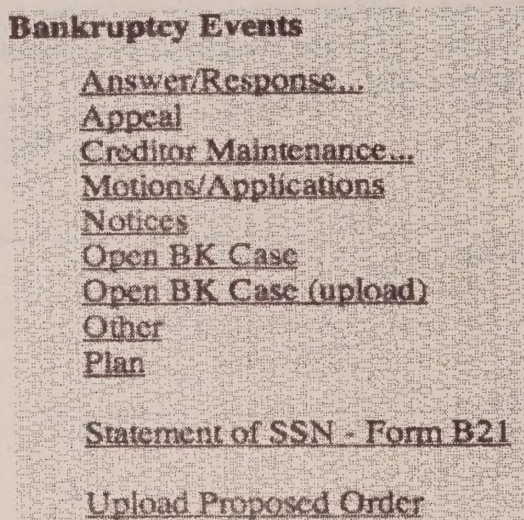


Figure 1

- Select Other.
- Type in the case number.
- Click [Next].
- Select the party represented.
- Click [Next].

STEP 2 The event list will display. (See Figure 2)

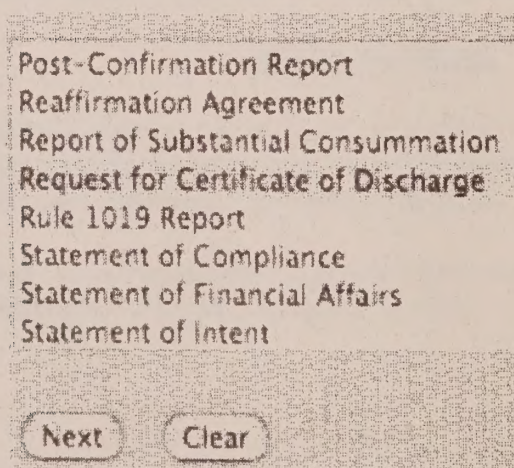
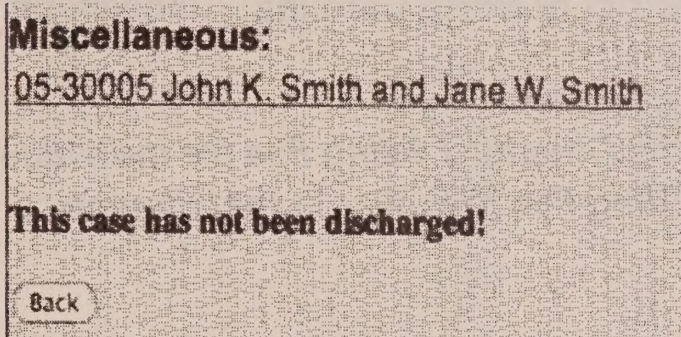


Figure 2

- Select the **Request for Certificate of Discharge** event code.
- Click [Next].

The event will verify that a discharge has been issued in the case.

If the case does not contain a discharge, the following statement will display.
(See Figure 3)



Miscellaneous:
05-30005 John K. Smith and Jane W. Smith

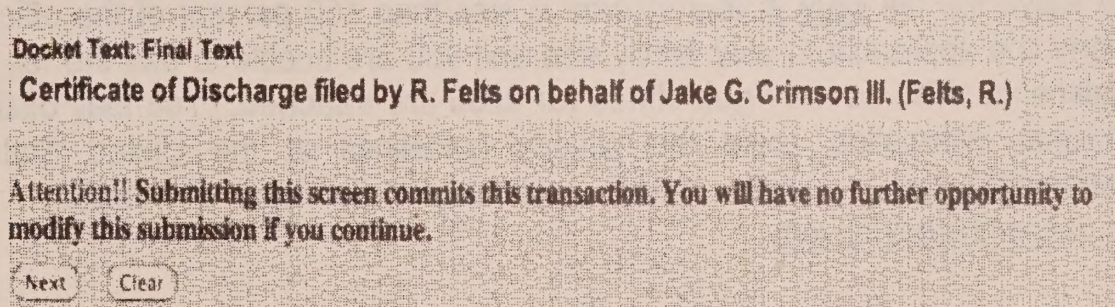
This case has not been discharged!

Back

Figure 3

The Request will not be able to be processed.

If a discharge has been issued, the event will proceed to docket the Certificate of Discharge and attach the PDF document.



Docket Text: Final Text

Certificate of Discharge filed by R. Felts on behalf of Jake G. Crimson III. (Felts, R.)

Attention!! Submitting this screen commits this transaction. You will have no further opportunity to modify this submission if you continue.

Next Clear

Figure 4

- The PDF of the Certificate of Discharge is the Court's Local Form 5. The Certificate of Discharge will include the signature of David E. Weich, Clerk of Court.
- A Notice of Electronic Filing containing the PDF file of the Certificate of Discharge will display. The PDF file can be printed from this screen.

Local Form 6

UNITED STATES BANKRUPTCY COURT
Western District of North Carolina

Instructions for Filing an
Application for Waiver of the Chapter 7 Filing Fee for Individuals
Who Cannot Pay the Filing Fee in Full or in Installments

The fee for filing a case under chapter 7 of the Bankruptcy Code is \$274.

If you cannot afford to pay the fee either in full at the time of filing or in installments, then you may request a waiver of the filing fee by completing this application (NCWD Local Form 6) and filing it with the Clerk of Court.

A judge will decide whether you have to pay the fee. By law, the judge may waive the fee **only if** your income is less than 150 percent of the official poverty line applicable to your family size and you are unable to pay the fee in installments. **The poverty guidelines for 2006 are attached.** You may obtain additional information about the poverty guidelines at the United States Department of Health and Human Services website at <http://aspe.hhs.gov/poverty>.

Required information. All items in the application and attached requested schedules must be answered in order for a proper determination to be made regarding allowance of your waiver of fee. If the question does not apply; write in not applicable or **n/a**. If the amount is zero or none use: **zero, -0-, none**. Sign the application on the last page. If you and your spouse are filing a joint bankruptcy petition, each of you must provide information as requested and sign the application. Your failure to timely comply with these requirements may result in the application being **denied**.

If your application is denied, an order will be entered directing the payment of the filing fee in installments.

2006 HHS Poverty Guidelines

Persons in Family or Household	48 Contiguous States and D.C.	Alask a	Haw a ii
1	\$ 9,800	\$12,250	\$11,270
2	13,200	16,500	15,180
3	16,600	20,750	19,090
4	20,000	25,000	23,000
5	23,400	29,250	26,910
6	26,800	33,500	30,820
7	30,200	37,750	34,730
8	33,600	42,000	38,640
For each additional person, add	3,400	4,250	3,910

SOURCE: *Federal Register*, Vol. 71, No. 15, January 24, 2006, pp. 3848-3849

Mar. 06

WESTERN DISTRICT BANKRUPTCY RULES

Local Form 6
Feb. 2006

UNITED STATES BANKRUPTCY COURT
Western District of North Carolina

In re:

Chapter 7

Debtor(s).

Case No. _____

Application for Waiver of the Chapter 7 Filing Fee for Individuals Who
Cannot Pay the Filing Fee in Full or in Installments

Part A. Family Size and Income

1. Including yourself, your spouse, and dependents you have listed or will list on **Schedule I, Current Income of Individual Debtors**, how many people are in your family? (Do not include your spouse if you are separated AND are not filing a joint petition.)

Number of people in family: _____

2. Restate the following information that you provided, or will provide, on **Line 16 of Schedule I, Current Income of Individual Debtor**. Attach a completed copy of Schedule I, if it is available.

Total Combined Monthly Income (line 16 of Schedule I): \$ _____

3. State the monthly net income, if any, of dependents included in Question 1 above. Do not include income already reported in Question 2. If none, enter \$0.

Monthly net income of dependents: \$ _____

4. Add the "Total Combined Monthly Income" reported in Question 2 to your dependents' monthly net income from Question 3.

Total of amounts in question 2 and question 3: \$ _____

5. Do you expect the amount in Question 4 to increase or decrease by more than 10% during the next 6 months?

Yes _____ No _____ If yes, explain: _____

WESTERN DISTRICT BANKRUPTCY RULES

Part B. Monthly Expenses

6. EITHER (a) attach a completed copy of Schedule J (Schedule of Monthly Expenses), and state your total monthly expenses reported on Line 18 of that Schedule, OR (b) if you have not yet completed Schedule J, provide an estimate of your total monthly expenses.

Total monthly expenses from Schedule J or estimate: \$ _____

7. Do you expect the amount in Question 6 to increase or decrease by more than 10% during the next 6 months?

Yes ____ No ____ If yes, explain: _____

Part C. Real and Personal Property

Either (1) attach completed copies of Schedule A (Real Property) and Schedule B (Personal Property), OR (2) if you have not yet completed those schedules, answer the following questions.

8. State the amount of cash you have on hand: \$ _____

9. State below any money you have in savings, checking, or other accounts in a bank or other financial institution.

Name of Financial Institution	Type of Account	Amount
_____	_____	\$ _____
_____	_____	\$ _____

10. State below the assets owned by you. **Do not list ordinary furnishings and clothing.**

Home Address:

_____ Value: \$ _____

_____ Amount owed on mortgages and liens: \$ _____

Other real estate address:

_____ Value: \$ _____

_____ Amount owed on mortgages and liens: \$ _____

Motor Vehicle Model/year: _____ Value: \$ _____

Amount Owed: \$ _____

Motor Vehicle Model/year: _____ Value: \$ _____

WESTERN DISTRICT BANKRUPTCY RULES

Amount Owed: \$ _____

Other (Describe): _____ Value: \$ _____

_____ Amount Owed: \$ _____

11. State below any person, business, organization, or governmental unit that owes you money and the amount that is owed.

Name of Person, Business, or Organization that Owes You Money Amount Owed:

_____ \$ _____

_____ \$ _____

Part D. Additional Information

12. Have you paid an attorney any money for services in connection with this case, including the completion of this form, the bankruptcy petition, or schedules?

Yes _____ No _____ If yes, how much have you paid? \$ _____

13. Have you promised to pay or do you anticipate paying an attorney in connections with your bankruptcy case?

Yes _____ No _____

If yes, how much have you promised to pay or do you anticipate paying?

\$ _____

14. Have you paid **anyone other than an attorney** (such as bankruptcy petition preparer, paralegal, typing service, or other person) any money for services in connection with this case, including the completion of this form, the bankruptcy petition, or schedules?

Yes _____ No _____ If yes, how much have you paid? \$ _____

15. Have you promised to pay **anyone other than an attorney** (such as bankruptcy petition preparer, paralegal, typing service, or other person) any money for services in connection with this case, including the completion of this form, the bankruptcy petition, or schedules?

Yes _____ No _____

If yes, how much have you promised to pay or do you anticipate paying?

\$ _____

16. Has anyone paid an attorney or other person or service in connection with this case, on your behalf?

Yes _____ No _____

WESTERN DISTRICT BANKRUPTCY RULES

If yes, explain: _____

17. Have you previously filed for bankruptcy relief during the past eight years?

Yes _____ No _____

Case Number (If known)	Year filed	Location of filing	Did you obtain a discharge? (if known)
_____	_____	_____	Yes _____ No _____ Don't know _____
_____	_____	_____	Yes _____ No _____ Don't know _____

18. Please provide any other information that helps to explain why you are unable to pay the filing fee in full or in installments.

19. I (we) declare under penalty of perjury that I (we) cannot currently afford to pay the filing fee in full or in installments and that the foregoing information is true and correct.

Executed on: _____ Date	_____ Signature of Debtor
_____ Date	_____ Signature of Debtor

Declaration and Signature of Bankruptcy Petition Preparer (See 11 U.S.C. §110)

I declare under penalty of perjury that: (1) I am a bankruptcy petition preparer as defined in 11 U.S.C. §110; (2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h), and 342(b); and (3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. §110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required under that section.

Printed or Typed Name and Title, if any, of Bankruptcy Petition Preparer

Social Security No. (Required by 11 U.S.C. §110).

If the bankruptcy petition preparer is not an individual, state the name, title (if any), address, and social security number of the officer, principal, responsible person, or partner who signs the document.

Address

x _____
Signature of Bankruptcy Petition Preparer Date

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document, unless the bankruptcy petition preparer is not an individual:

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person.

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; U.S.C. § 156

WESTERN DISTRICT BANKRUPTCY RULES

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
[insert correct division name] DIVISION

In re:

) Case No. - - -

) Chapter 13

)
)
)
)
) Debtor(s)

CHAPTER 13 PLAN INCLUDING NOTICE AND MOTION(S) FOR VALUATION;
MOTION(S) TO AVOID CERTAIN LIENS;
ASSUMPTION AND REJECTION OF EXECUTORY CONTRACTS
NOTICE OF OPPORTUNITY FOR HEARING ON CONFIRMATION OF THE PLAN
INCLUDING ALL MATTERS AS SET FORTH IN THE PLAN
FOR CASES FILED ON OR AFTER OCTOBER 17, 2005

The following is the Chapter 13 plan proposed by the above-named debtor(s). The plan may also include in its provisions certain motions to avoid liens and motions for valuation of collateral securing claims.

TAKE NOTICE: Your rights may be affected. You should read the plan carefully, including any motions contained in the plan, and discuss them with your attorney, if you have one. If you do not have an attorney, you may wish to consult one.

If you do not want the Court to confirm the proposed plan of the debtor(s), including any of the motions included in the plan, or if you want the court to consider your views on these matters, then you or your attorney must file with the Court a written objection to confirmation and request for hearing on confirmation at one of the following addresses:

Cases filed in the **Charlotte, Shelby or Wilkesboro** Divisions:
Clerk, U.S. Bankruptcy Court, P.O. Box 34189, Charlotte, N.C. 28234-4189

Cases filed in the **Asheville or Bryson City** Divisions:
Clerk, U.S. Bankruptcy Court, Room #112, 100 Otis Street, Asheville, N.C. 28801

Your objection to confirmation and request for hearing must include the specific reasons for your objection, and must be filed with the Court no later than fifteen (15) days following the conclusion of the combined hearing on plan, Section 341(a) meeting of creditors, and trustee's recommendation for the plan's confirmation. If you mail your objection to confirmation to the Court for filing, you must mail it early enough so that the Court will receive it on or before the deadline stated above. You must also serve a copy of your objection to confirmation on the debtor(s), the attorney for the debtor(s), and the Chapter 13 trustee at their addresses as they

WESTERN DISTRICT BANKRUPTCY RULES

are listed in the notice of the meeting of creditors. If any objections to confirmation are filed with the Court, the objecting party will provide written notice of the date, time and location of the hearing on the objection. No hearing will be held unless an objection to confirmation is filed.

If you or your attorney do not take these steps, the Court may decide that you do not oppose the proposed plan of the debtor(s), including any motions contained in the plan, and may enter an order confirming the plan and granting the motions.

Any creditor's failure to object to confirmation of the proposed plan shall constitute the creditor's acceptance of the treatment of its claim as proposed, pursuant to 11 U.S.C. Section 1325(a)(5)(A).

PLAN PAYMENTS; ADMINISTRATIVE COSTS; PROOFS OF CLAIM

1. a. The plan proposes payments of \$ _____ per month for _____ months or
b. The plan proposes payments of \$ _____ per month for _____ %
(percentage) payment to general unsecured creditors.
c. If applicable, the plan will also be funded by: _____

2. The plan payments shall commence within ten (10) days of the case file date.
3. **Administrative Costs**
 - a. Attorney's Fees. The attorney for the debtor(s) has received \$ _____ of the total base attorney fee of \$ _____. The remainder of the base fee shall be paid through the plan by the trustee on a pro rata basis with required monthly payments to allowed secured claimants.
 - b. Trustee's Costs. The trustee shall be entitled to reimbursement of fees and costs up to the statutory maximum on each disbursement made by the trustee, regardless of whether it is paid prior to or following confirmation.
4. **Filing of Proofs of Claim**
 - a. The trustee shall only distribute payments, including adequate protection payments, to creditors who have actually filed proofs of claim (including adequate proof of security) with the Court that are deemed allowed pursuant to 11 U.S.C. Section 502(a). However, if a creditor does not file a timely proof of such creditor's claim, then either the debtor(s) or the trustee may file such a claim as provided for by 11 U.S.C. Section 501(c) and in that event such claim shall be deemed the claim for all purposes under the plan.
 - b. The trustee shall mail payments to the address provided on the proof of claim unless the claimant provides the trustee with another address in writing for payments to be sent. If the claim is assigned or transferred, the trustee shall continue to remit payments to the original claimant until a formal notice of assignment or transfer is filed with the Court.

CLASSIFICATION AND TREATMENT OF CLAIMS

5. PRIORITY CLAIMS. All claims entitled to priority under 11 U.S.C. Section 507 and 1322 shall be paid in full in deferred cash payments, except for priority claims under Section 507(a)(1)(B), unless the holder of the particular claim agrees to a different treatment of such claim.

a. Domestic Support Obligations ("DSOs")

All post-petition DSOs, including post-petition DSOs assigned to a governmental unit, will be paid directly to the holder by the debtor(s) or to the assignee of the claim and not through the Chapter 13 Trustee unless otherwise specified under the "Special Terms" section of the plan.

i. ☐ None

ii. The name, address and phone number including area code of the holder of any DSO as defined in 11 U.S.C. Section 101(14A). Pursuant to 11 U.S.C. Section 112, the names of minor children should not be disclosed.

<u>Name</u>	<u>Address (incl. city, state, zip code)</u>	<u>Telephone</u>
-------------	--	------------------

1.

2.

b. DSO Pre-Petition Arrearages Owed to DSO Holders Under 11 U.S.C. Section 507(a)(1)(A), or assigned to a governmental unit, to be paid in full through the Chapter 13 plan on a pro-rata basis after payment of secured claims and the attorney fee and prior to payment of any non-DSO priority claim, unless a different treatment is proposed under the "Special Terms" section of the plan:

i. ☐ None

ii. <u>Name of holder</u>	<u>Amount of Arrearage</u>
---------------------------	----------------------------

1.

2.

c. Priority Claims Other Than DSOs

All priority claims other than DSOs shall be paid in full on a pro rata basis after the payment in full of all DSO priority claims.

i. ☐ None

WESTERN DISTRICT BANKRUPTCY RULES

- ii. The names and amounts of all claims entitled to priority under 11 U.S.C. Section 507, other than DSOs:

<u>Name</u>	<u>Claim Amount</u>
1.	
2.	

6. SECURED CLAIMS

Other than secured claims that are to be paid as long-term debts pursuant to 11 U.S.C. Section 1322(b)(5), or that are to be paid directly by the debtor(s), the trustee shall pay the value of all allowed secured claims, on a pro rata basis in monthly amounts sufficient to provide adequate protection.

The trustee, on behalf of the debtor(s), will reserve pre-confirmation adequate protection payments for creditors holding purchase money security interests in personal property who have actually filed proofs of claim, and shall disburse said adequate protection payments with the first post-confirmation distribution to creditors, except that the trustee shall not be required to provide for any pre-confirmation adequate protection payments on account of any allowed secured claim with a secured value of less than \$2,000.00. The adequate protection payments shall be equal to 1% of the value of the collateral as provided for in the proof of claim.

To the extent that the valuation provisions of 11 U.S.C. Section 506 do not apply to any of the claims listed below, the creditor's failure to object to confirmation of the proposed plan shall constitute the creditor's acceptance of the treatment of its claim as proposed, pursuant to 11 U.S.C. Section 1325(a)(5)(A).

For purposes of the plan, the treatment of each claim is specified below. Treatment shall be one of the following: (1) Direct payment by the debtor(s): "**Direct**"; (2) Payment in full by the Chapter 13 Trustee through the plan: "**In Full**"; (3) Payment of the value of the collateral by the Chapter 13 Trustee through the plan: "**Bifurcate**"; (4) Debtor(s) will surrender the collateral: "**Surrender**", or (5) File proceeding to determine validity of lien: "**Avoidance**."

<u>Creditor</u>	<u>Collateral</u>	<u>Value of Coll.</u>	<u>Claim Amt.</u>	<u>Treatment</u>	<u>Int. Rate</u>
1.					
2.					
3.					
4.					

To the extent that any of the claims referred to above are secured by mortgage loans on real property, and such claims are scheduled to be paid by the Trustee, then and in that event the Debtors will no longer be making any mortgage payments to any of the designated mortgage servicers and/or their successors and assigns and all such entities are hereby authorized to provide account information to the Chapter 13 Trustee.

WESTERN DISTRICT BANKRUPTCY RULES

For secured claims to be paid directly by the debtor(s), state below the amount of pre-petition arrearages to be paid through the Chapter 13 Trustee:

<u>Creditor</u>	<u>Collateral</u>	<u>Pre-pet. arrearage</u>	<u>Int. Rate.</u>
1.			
2.			
3.			

If the treatment option for secured claims is "**Surrender**", the debtor(s) surrenders any interest in the collateral securing the claims of the specified creditors. Upon confirmation, the automatic stay will be deemed lifted for the collateral and the creditor need not file a motion for relief from stay in order to repossess, foreclose upon or sell the collateral. Nothing herein is intended to lift any applicable co-debtor(s) stay, or to abrogate the debtor(s)' state law contract rights.

7. General Unsecured Claims Not Separately Classified

General unsecured claims shall be paid on a pro rata basis with payments to commence after the payment of all administrative, secured and priority unsecured claims in full.

8. Executory Contracts and Unexpired Leases

a. ☐ None

b. The debtor(s) has the following executory contracts and unexpired leases. If assumed, payments due after the filing of the case will be paid directly by the debtor(s) rather than by the trustee.

c. Unless otherwise provided, the debtor(s) proposes to promptly cure any pre-bankruptcy defaults on the assumed leases or contracts over a period of _____ months, with said payments to be made by the trustee.

<u>Creditor</u>	<u>Assume or Reject</u>	<u>If Assumed, Amount of Arrearage paid in Plan</u>
1.		
2.		

9. Special Terms

a. ☐ None

b. Special Treatment of Unsecured Claims

c. Other Direct Payments to Creditors Other than Section 6.

d. Other Special Terms

10. Plan Motions:

Motion to Value All Liens in Paragraph #6

The debtor(s) hereby moves the Court to value the collateral of each of the above-stated creditors at the collateral value stated. To the extent that the amount of the debt of any such creditor exceeds the stated collateral value, the debtor(s) hereby moves the Court that said difference be treated in the Chapter 13 plan as a general unsecured claim without priority. The debtor(s) further moves the Court that the lien of each creditor listed upon the collateral listed hereinabove be satisfied upon payment of the collateral value and the issuance of the debtor(s) discharge.

Motion to Avoid Non-Possessory, Non-Purchase Money Security Interests in Household Goods and Personal Items

The debtor(s) is indebted to the following creditors in the amounts stated. As security for the debt, each such creditor insisted upon, and the debtor(s) executed, a waiver of exemption of certain property, and a security agreement granting said creditors a non-possessory, non-purchase money security interest in household goods which is property delineated by 11 U.S.C. Section 522(f)(2) and which is held primarily for the personal, family or household use of the debtor(s) or a dependent of the debtor(s). The debtor(s) believes that a financing statement may have been properly filed evidencing each such creditor's security interest and liens:

<u>Creditor</u>	<u>Account/I.D.</u>	<u>Debt Amount</u>	<u>Description of Property</u>
-----------------	---------------------	--------------------	--------------------------------

- 1.
- 2.

The debtor(s)' interest in any item of property referred to above does not exceed the value claimed as exempt. The money borrowed from each such creditor does not represent any part of the purchase money of any of the items covered by each such creditor's security agreement. The existence of each such creditor's lien on the debtor(s)' household goods and personal items impairs the exemptions to which the debtor(s) would be entitled under Section 1C-1601 of the North Carolina General Statutes or as otherwise applied under applicable state law. The debtor(s) moves the Court for the cancellation and avoidance of the security interest of each such creditor in the debtor(s)' personal and household goods, effective upon discharge.

Motion to Avoid Judicial Liens

Judgments were obtained by the creditors listed below in cases before the General Court of Justice of the State of North Carolina, and said judgments have been recorded in the Public Registry as follows:

<u>Creditor</u>	<u>Judgment Book And Page</u>	<u>Registry</u>	<u>Judgment Date</u>	<u>Judgment Lien Amount</u>
-----------------	-----------------------------------	-----------------	----------------------	---------------------------------

- 1.
- 2.

WESTERN DISTRICT BANKRUPTCY RULES

The above-stated judgments created liens on the real property in which the debtor(s) has an interest, which real property is more specifically described as _____. The value of the debtor(s)'s interest in this real property is \$ _____. The aforesaid liens constitute judicial liens under 11 U.S.C. Section 522(f)(1). The property which this judicial lien encumbers is property which the debtor(s) is entitled to exempt under 11 U.S.C. Section 522 and the claimed amount of this exemption is \$ _____. The existence of this judicial lien impairs the exemption to which the debtor(s) is entitled under Section 1C-1601 of the North Carolina General Statutes or as otherwise applied under applicable state law.

The debtor(s) respectfully moves the Court to issue an order compelling the above-stated creditors to cancel and avoid their judicial liens upon the real property described herein, effective upon discharge.

General Provisions

1. To receive payment from the trustee, either prior to or following confirmation, a secured creditor must file a proof of claim. Secured claims which are not filed within the time period required by Federal Bankruptcy Rule 3002(c) may be disallowed or subordinated to other claims upon further order of the Court.
2. Confirmation of this plan does not bar a party in interest from objecting to a claim which is not filed in accordance with Federal Bankruptcy Rules 3001 or 3002.
3. Unless otherwise ordered, any creditor holding a claim secured by property which is removed from the protection of the automatic stay, whether by judicial action, voluntary surrender, or through operation of the plan, will receive no further distribution from the trustee, unless an itemized proof of claim for any deficiency is filed within one-hundred twenty (120) days after the removal of the property from the protection of the automatic stay. For purposes hereof, the removal date shall be the date of the entry of the order confirming the plan, modifying the plan, or granting relief from stay. This also applies to creditors who may claim an interest in, or lien upon, property which is removed from the protection of the automatic stay of another lien holder or release to another lien holder.
4. If a claim is listed in the plan as secured and the creditor files a proof of claim as an unsecured creditor, the creditor shall be treated as unsecured for purposes of distribution and for any other purpose under the plan.
5. Property of the estate includes all of the property specified in 11 U.S.C. Section 541 and all property of the kind specified in such section acquired by the debtor(s) after commencement of the case but before the case is closed, dismissed or likewise converted to one under another chapter of the Code.
6. Confirmation of the plan shall impose a duty on the holders and/or servicers of claims secured by liens on real property to apply the payments received from the trustee on the pre-petition arrearages, if any, only to such arrearages; to deem the pre-petition arrearages as contractually cured by confirmation; to apply the direct mortgage payments, if any, paid by the

WESTERN DISTRICT BANKRUPTCY RULES

trustee or by the debtor(s) to the month in which they were made under the plan or directly by the debtor(s), whether such payments are immediately applied to the loan or placed into some type of suspense account; to notify the trustee, the debtor(s) and the attorney for the debtor(s) of any changes in the interest rate for an adjustable rate mortgage and the effective date of the adjustment; to notify the trustee, the debtor(s) and attorney for the debtor(s) of any change in the taxes and insurance that would either increase or reduce the escrow portion of the monthly mortgage payment; and to otherwise comply with 11 U.S.C. Section 524(i).

7. All contractual provisions regarding arbitration or alternative dispute resolution are rejected in connection with the administration of this Chapter 13 case.

I declare under penalty of perjury that the information provided in the Chapter 13 Plan, including Motion(s) for Valuation; Motion(s) to Avoid Certain Liens; and the Assumption and Rejection of Executory Contracts and Unexpired Leases; as to all matters set forth herein are true and correct.

Dated _____
Debtor's Signature

Dated _____
Debtor's Signature

I hereby certify that I have reviewed this document with the debtor(s) and that the debtor(s) have received a copy of this document.

Dated _____
Attorney for the Debtor(s)

WESTERN DISTRICT BANKRUPTCY RULES

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
[insert correct division name] DIVISION

In re:) Case No. - - - -
)
)
) Chapter 13
)
)
Debtor(s))

AMENDMENT TO:

**CHAPTER 13 PLAN, INCLUDING NOTICE OF MOTION(S) FOR VALUATION;
MOTION(S) TO AVOID CERTAIN LIENS; ASSUMPTION AND
REJECTION OF EXECUTORY CONTRACTS; AND NOTICE OF OPPORTUNITY
FOR HEARING ON CONFIRMATION OF THE PLAN INCLUDING ALL MATTERS AS
SET FORTH IN THE PLAN, FOR CASES FILED ON OR AFTER OCTOBER 17, 2005**

The Chapter 13 Plan, including certain motions and other provisions, is hereby **amended** as follows:

TAKE NOTICE: Your rights may be affected. You should read this amendment to the Chapter 13 Plan carefully, including any motions contained in the amended plan, and discuss them with your attorney, if you have one, in this bankruptcy case. If you do not have an attorney, you may wish to consult one.

If you do not want the Court to confirm the proposed plan of the debtor(s) as amended, including any of the motions included in the amended plan, or if you want the court to consider your views on these matters, then you or your attorney must file with the Court a written objection to confirmation and request for hearing on confirmation at the following addresses:

Cases filed in the **Charlotte, Shelby or Wilkesboro** Divisions:

Clerk, U.S. Bankruptcy Court, P.O. Box 34189, Charlotte, N.C. 28234-4189.

WESTERN DISTRICT BANKRUPTCY RULES

Cases filed in the **Asheville or Bryson City** Divisions:

Clerk, U.S. Bankruptcy Court, Room #112, 100 Otis Street, Asheville, N.C. 28801

Your objection to confirmation and request for hearing must include the specific reasons for your objection, and must be filed with the Court no later than fifteen (15) days following the conclusion of the combined hearing on plan, **continued** meeting of creditors, and Trustee's recommendation for the plan's confirmation. If you mail your objection to confirmation to the Court for filing, you must mail it early enough so that the Court will receive it on or before the deadline stated above. You must also serve a copy of your objection to confirmation on the debtor(s), the attorney for the debtor(s), and the Chapter 13 trustee at their addresses as they are listed in the notice of the meeting of creditors. If any objections to confirmation are filed with the Court, the objecting party will provide written notice of the date, time and location of the hearing. No hearing will be held unless an objection to confirmation is filed.

If you or your attorney do not take these steps, the Court may decide that you do not oppose the proposed plan of the debtor(s) as amended, including any motions contained in the amended plan, and may enter an order confirming the amended plan and granting the motions.

Any creditor's failure to object to confirmation of the proposed plan as amended shall constitute the creditor's acceptance of the treatment of its claim as proposed, pursuant to 11 U.S.C. Section 1325(a)(5)(A).

I declare under penalty of perjury that the information provided in the **Amendment** to Chapter 13 Plan, including Notice of Motion(s) for Valuation; Motion(s) to Avoid Certain Liens; and the Assumption and Rejection of Executory Contracts and Unexpired Leases; as to all matters set forth herein are true and correct.

Dated _____
Debtor's Signature

Dated _____
Debtor's Signature

I hereby certify that I have reviewed this document with the debtor(s) and that the debtor(s) have received a copy of this document.

Dated _____
Attorney for the Debtor(s)

WESTERN DISTRICT BANKRUPTCY RULES

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
[insert correct division name] DIVISION

IN THE MATTER OF:

Case Number _____

SSN: xxx-xx-_____

SSN: xxx-xx-_____

Debtor(s)

DEBTOR(S) CERTIFICATION AND AFFIDAVIT – 341(a) MEETING

The undersigned, being the Debtor(s) referenced above, do hereby certify under oath administered by the Standing Trustee at the 341 meeting of creditors conducted on the date noted below, the following (Check the appropriate option, filling in the information requested as needed. Unless otherwise indicated by you, the responses to these statements apply to both Debtors in a joint case):

A. DOMESTIC SUPPORT OBLIGATION CERTIFICATION

1. () I am not presently required by any judicial or administrative order or statute to pay any domestic support obligation (as defined in 11 USC section 101(14A)); or,
() I am required to pay under a domestic support order, and the full information as required by law as to the identity of the holder of this claim is already included in my petition, including the name and full address of the holder, and ages and custodian of any children relating to the support order, and
() as of the date of this affidavit, I am current under any obligation created therein; **AND** I specifically agree to notify my Trustee should I miss any payments due or otherwise become delinquent under any support obligation from this day until my confirmation order is entered.
() I am presently in arrears as of the date of this affidavit as follows:
() I have only those arrears as listed in my petition, and am current post-petition through today; or,
() I have arrears as listed in my petition, and have in addition incurred the following post-petition arrearage:

B. TAX RETURN CERTIFICATION

2. () I am not required to file Federal, State or local tax returns because: _____

3. () I was not required to file Federal, State and local tax returns for the following years (and state reason why not so required): _____

4. () I was required to file Federal, State and local tax returns for all taxable periods ending within the 4- year period prior to the filing of this bankruptcy and I have filed all four years' returns.

C. CERTIFICATION OF WAGES

5. () My petition contains valid and accurate information as regards the last 60 days of payment for wages I have received pre-petition from my employer as listed.

Please note any changes from the information contained in the petition:

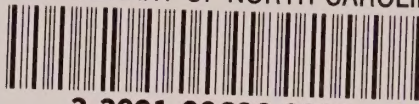
By signing this affidavit, I acknowledge that all of the statements contained herein are true and accurate, and the Trustee and Court may rely on these statements for purposes of determining if confirmation of my proposed Plan is allowed under the provisions of the Bankruptcy Code. Any inaccuracy in this affidavit may be grounds for revocation or denial of my confirmation.

Dated this the _____ day of _____, 200__.

Debtor

Debtor

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LDS

